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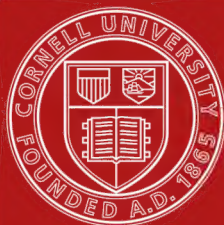
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BARCLAY'S MISSOURI DIGEST.

1820-1859.

EXTRACTS FROM COMMENDATORY LETTERS.

From Hon. WILLIAM SCOTT, Hon. W. B. NAPTON, and Hon. JNO. C. RICHARDSON, Judges of the Supreme Court.—Our engagements have not permitted us to make such an examination as will enable us to express an opinion as to anything more than the plan of the work, which meets with our approbation. The want of a Digest of our Reports on the plan of this has long been felt. The list of the decided cases, with the names of the parties inverted, is well worth the price of the book.

From R. M. FIELD, Esq.—In my judgment, the work is well done.

From Hon. EDWARD BATES.—I have examined the work with as much care as my present engagements allow, and am very much pleased with it. The arrangement and classification seem to be excellent, and the skillful labor employed in performing the work must have been very great. Your work will save a great deal of time and labor to the Missouri bar, and all of us will have cause to thank you for making a reference to our State decisions far more easy, cheap and certain than ever heretofore.

From CHAS. D. DRAKE, Esq.—I have examined with care the first 350 pages of Mr Barclay's Digest of Missouri Reports, and take pleasure in expressing my high appreciation of the work. It gives abundant evidence of patient, faithful and accurate labor, and is, in my judgment, worthy of the confidence and patronage of the profession. Indeed, it must be regarded as an indispensable part of the library of every lawyer in the State.

From Hon. JAS. R. LACKLAND, Judge of the St. Louis Circuit Court.—I have carefully examined your forthcoming Digest of the decisions of the Supreme Court of the State of Missouri. Allow me to congratulate you on the success of your effort, which must have cost you much labor and patient investigation. The classification and arrangement of the various subjects, under their proper heads, are appropriate and well considered, and the matter appears well digested and set forth. I regard your work to an eminent degree accurate and complete, and one which, in my judgment, will be found indispensable to the bench and the bar of this State, and of great utility to the profession generally.

From Hon. SAMUEL REBER, Judge of the St. Louis Court of Common Pleas.—I have examined with some care the first 350 pages of your forthcoming Digest of the Missouri Reports, and take pleasure in saying, that if the succeeding portions are as well executed as those I have seen, your publication will be a very valuable acquisition to the bench and the bar of the State. Your work supplies a want which has long been felt, and will be indispensable to every lawyer's library in the State.

From Hon. H. A. CLOVER, Judge of the St. Louis Criminal Court.—So far as I have been able to examine the work, and particularly with reference to those decisions pertaining to the criminal law, which I have more carefully examined, I am pleased to be able to congratulate you upon having pursued your work with much judiciousness, skill and fidelity, and also to commend the manner of its arrangement, and its typographical execution—the latter quality, by the way, no mean merit in the eyes of a professional man.

From Hon. JOHN M. KRUM.—It affords me pleasure to say that I find the plan and arrangement of the work admirably adapted to the purposes of a Digest. The points adjudged in the cases reported are stated with clearness and perspicuity, and with such convenient references as to make the Digest, what it should be, a complete analytical index to the points and cases reported. It is a work that has long been needed in this State, and the members of the bar and the courts are under obligations to the intelligent and industrious author for this full and well arranged Digest.

From SAM'L T. GLOVER, Esq.—I have made a very partial examination of the Digest, and I am satisfied that it will be useful to the profession,

A DIGEST

OF THE

DECISIONS OF THE SUPREME COURT

OF THE

STATE OF MISSOURI,

CONTAINED IN THE FIRST TWENTY-SEVEN VOLUMES OF REPORTS

BY D. ROBERT BARCLAY,

OF THE ST. LOUIS BAR.

ST. LOUIS:
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CASES OMITTED IN THE TEXT.*

CRIMINAL LAW—PRACTICE.

The defendant was indicted under the statute (R. S. 1835, 209, § 31) for selling "fermented liquors" after nine o'clock on Sunday morning, and was found guilty. The fact was that he sold *Ale*, and some evidence was given tending to show that ale was a fermented liquor—*Held*, that whether ale was a fermented liquor or not was a question of fact for the jury. *Back v. The State*, viii. 497.

NOTES—CONSIDERATION.

The defendant executed his note to the plaintiff for the latter's "equitable title" to certain lands; but the plaintiff had no available title whatever, and it was *held* that there was a total failure of consideration. *Jones v. Shaver*, vi. 642.

When the purchaser is in possession of the land sold, and a deed of it has not been refused, a parol agreement by the vendor to convey, constitutes a valuable consideration for a promissory note for the purchase money. *Ott v. Garland*, vii. 28.

The defendant gave his note for a part of the price of an improvement on public land, the vendor warranting the "claim against all future claims or pre-emption rights"—*Held*, that the fact that the claim was divided by a river, and that the land officer refused to permit the defendant to enter the portion of land on one side of such river, did not constitute a failure of consideration. The remedy, if any, is on the warranty. *Johnson v. Lewis*, x. 153.

The defendant made his note to the plaintiff for the purchase money of certain lands, payable in instalments, so as to meet amounts becoming due on a mortgage to which the lands were subject. The failure of the defendant to pay his note as the instalments fell due disabled the plaintiff from paying the mortgage, and it was foreclosed upon the land.—*Held*, that the failure of the plaintiff to pay the mortgage constituted no ground of defense against the note, since such failure was caused by the defendant's own fault. *Clark v. Condit*, xi. 79.

Nor is such defense available in chancery. *Same Case*, xiii. 222.

Where the vendee of lands executed a negotiable note for the purchase money to a third party, the fact that the vendor failed to make to the vendee a good title is no defense to the note. *Glascock v. Rand*, xiv. 550.

Where a note given for a quit claim deed was payable unless the grantees should, within twelve months, establish the fact that the grantors had no title, it was *held*, that if the grantees failed to establish such fact within the twelve months, they could not afterwards avail themselves of it as a defense to the note on the ground of failure of consideration. *Carter v. Harber*, xviii. 204.

PRACTICE.

Where, in cases arising under the practice act of 1849, facts are set up in an answer by way of an equitable defense to the action, and not as a set-off, the plaintiff is not required to reply. *Blodgett v. Greene*, xxii. 525.

The defendant was summoned before a Justice to answer the suit of M. McC. on a note assigned to the latter. Judgment was rendered in favor of J. M. McC., from which the defendant appealed and gave an appeal bond to J. M. McC.—*Held*, that he thereby admitted that the plaintiff was as well known by one name as the other. *Thruston v. McClanahan*, v. 521.

*NOTE.—Since the text was in print I have compared it throughout with the list of cases, with a view to a verification of its completeness, and have thus discovered the omissions which are here supplied.

PREFACE.

This Digest is presented to the indulgent consideration of the profession in Missouri, under the consciousness that more time might well have been devoted to it, demanding as it does much patient research and accurate labor. The work is one of such variety and extent, that it would seem to require years, instead of months, of assiduous application. Had I fully appreciated the task which was before me when I entered upon its execution some sixteen months ago, it is quite possible that the undertaking would have been abandoned at the outset.

The entire twenty-seven volumes have been reviewed, and the head notes of the cases revised, and corrected where they seemed to require it. In the accomplishment of this part of the work, I have brought the matter of the cases into a narrower and more convenient compass, whether with more clearness and perspicuity, or more correctly, is for others to judge. I have given the points directly adjudged in each case, and then added such *dicta* as occurred to me as of value for preservation and reference. To the latter, the name of the judge pronouncing the judgment of the court is subjoined.

As a new feature in a Digest, I have prepared at much cost of time and examination, a list of cases in which the Constitution of the United States or of this State, or statutory enactments of this State or of the United States, have been construed, commented upon or referred to, and connected the statutes of this State commented upon, as closely as practicable, with corresponding or analagous statutes now in force, adopting therein the order and arrangement of the Revised Statutes of 1855.

If this edition should meet with a ready sale, I shall hereafter publish, with corrections, a second, combining therein such future cases as shall then have been reported; and in such second edition it will be my aim, with more time at command, to perfect the work to the best of my ability, and, by stereotyping, render it permanent, leaving the after volumes of Reports to be published in

the supplemental volumes of the Digest, which I intend to prepare from time to time as they are demanded by the accumulation of additional volumes of Reports.

Imperfect as this compilation may seem to those who are accustomed to the accuracy and perfect finish of the elementary works of the law, it has been attended with an amount of uninviting labor and dry research which, it is not probable the general reader will fully appreciate. Its preparation has involved the examination of over four thousand cases, and some six thousand legislative acts and parts of acts, and the collation and correction of more than thirty thousand references. I have labored industriously to avoid inaccuracies, but if any should be found, notwithstanding my efforts to avoid them, the extent of the work and the shortness of the time in which I have had to accomplish it, will suggest an apology, and for the rest I must beg the indulgence of the profession, for whose convenience and advantage I claim to have labored faithfully if not well, in the accomplishment of a task at once profitless and uninteresting.

My best thanks are due, and are hereby tendered, to all who, in any way, have aided me in the accomplishment of this undertaking. Nothing could exceed the kindness with which my brother members of the bar in St. Louis have answered my inquiries, and given me the benefit of their experience. I gratefully acknowledge my obligations to CHARLES D. DRAKE, Esq., whose learned treatise on Attachment has conferred upon him distinction as an author, for many valuable suggestions, which have tended materially to facilitate the completion of the work; and it is due to say that I am indebted to WARREN CURRIER, Esq., for the arrangement of the matter under the titles, "Chancery," "Pleading," "Practice," and "Practice in Supreme Court." I am also under especial obligations to L. K. KINSEY, Esq.

Should this Digest render the labor of the professional student any the less arduous, or at any time or in any way aid the profession in the dry research to which they are daily subjected, I shall be abundantly repaid in the reflection that my labors have not been useless.

D. ROBT. BARCLAY.

ST. LOUIS, June, 1859.

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 Yourie, Yantis v., x. 669.
 Youse v. Norcoms, xii. 549. . . <i>Husb and Wife</i>, 72.</p> | <p style="text-align: center;">Z.</p> <p>Zallee, L'Hussier v., xxiv. 13.
 Zeigler v. Maddox, xxvi. 575. . . <i>Fraudlt Conveyances</i>, 34, 35.
 Zepp, Taylor v., xiv. 482.
 Zierlien, Bentzen v., iv. 417.
 Zimmermann, Gibson v., xii. 385.
 Zule, White v., xiii. 233.
 Zumwalt, Groce v., iv. 567.
 " v. Zumwalt, iii. 269. . . <i>Appeal</i>, 27.
 Zwifle, The State v., xxii. 467.</p> |
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LIST OF JUDGES

OF THE

SUPREME COURT OF THE STATE OF MISSOURI,

FROM ITS ORGANIZATION IN 1820 to 1859.

1821—1823.	}	MATHIAS McGIRK,
Vol. I to p. 277.	}	JOHN D. COOK,
	}	JOHN RICE JONES.
1823—1824.	}	MATHIAS McGIRK,
Vol. I, p. 278—420.	}	JOHN RICE JONES,
	}	RUFUS PETTIBONE.
1824—1825.	}	MATHIAS McGIRK,
Vol. I, p. 421—536.	}	RUFUS PETTIBONE,
	}	GEORGE TOMPKINS.
1825—1837.	}	MATHIAS McGIRK,
Vols. I, p. 537 to V.	}	GEORGE TOMPKINS,
	}	ROBERT WASH.
1837—1839.	}	MATHIAS McGIRK,
Vol. V. to p. 512.	}	GEORGE TOMPKINS,
	}	JOHN C. EDWARDS.
1839—1840.	}	MATHIAS McGIRK,
Vols. V, p. 512 to VII.	}	GEORGE TOMPKINS,
	}	WILLIAM B. NAPTON.
1840—1845.	}	GEORGE TOMPKINS,
Vols. VII to IX, 246.	}	WILLIAM B. NAPTON,
	}	WILLIAM SCOTT.
1845—1846.	}	WILLIAM B. NAPTON,
Vols. IX, 247 to XII, 367.	}	WILLIAM SCOTT,
	}	PRIESTLY H. McBRIDE.
1846—1851.	}	WILLIAM B. NAPTON,
Vols. XII, 369, to XV.	}	JOHN F. RYLAND,
	}	JAMES H. BIRCH.
1851—1854.	}	HAMILTON R. GAMBLE,
Vols. XV to XX, 221.	}	WILLIAM SCOTT,
	}	JOHN F. RYLAND.
1854—1857.	}	WILLIAM SCOTT,
Vols. XX, 222 to XXV, 447.	}	JOHN F. RYLAND,
	}	ABIEL LEONARD.
1857—1859.	}	WILLIAM SCOTT,
Vols. XXV, 448 to XXVIII.	}	WILLIAM B. NAPTON,
	}	JOHN C. RICHARDSON.

ABSTRACT OF CASES.

DIGEST.

ACCOUNT.

1. When an account between parties is stated, with debit and credit sides, and the matter about which the controversy arose is stated therein, the presumption of law is that the account is correct, and the jury should so treat it, unless they are satisfied of fraud, omission or mistake in the account as stated. *Carroll v. Paul*, xvi. 226.

2. Form of declaration in an action of account. *Hughes v. Woosley*, xv. 492.

3. When an account against the State is certified to the auditor, it is conclusive on him only as to the correctness of the statements therein contained; and it is his right and duty to determine whether the State or County is required to pay the whole, or any part of such account. *The State v. Hinkson*, vii. 353.

See EVIDENCE, 178; . . . LIMITATIONS, 55.

ACTION.

I. WHEN MAINTAINABLE.

- a. GENERALLY.
- b. BETWEEN TENANTS IN COMMON.

II. WHEN NOT MAINTAINABLE.

- a. GENERALLY.
- b. FRAUD AND FAILURE OF CONSIDERATION.
- c. AGAINST RECORDER OF DEEDS.
- d. FOR SEDUCTION
- e. ON LOST BOND OR NOTE.

III. COMMENCEMENT.

IV. CONSOLIDATION.

V. ASSIGNMENT OF INTEREST IN.

VI. PARTIES.

- a. PLAINTIFFS.
 - aa. Generally.
 - bb. Party in Interest.
 - cc. Joinder of Plaintiffs.
- b. DEFENDANTS.

VII. ABATEMENT BY DEATH

VIII. SURVIVORSHIP AND REVIVAL OF.

- a. SCIRE FACIAS TO REVIVE.
- b. IN PARTICULAR CASES.
 - aa. Ejectment.
 - bb. False Return.
 - cc. Common Carrier—Damages.
 - dd. Master and Slave.
 - ee. Mechanics' Lien—Scire Facias.
 - ff. Replevin.
 - gg. Trespass.
 - hh. Trover.
 - ii. Forcible Entry and Detainer.

IX. SPLITTING A CAUSE OF ACTION.

I. WHEN MAINTAINABLE.

a. GENERALLY.

1. The defendant covenanted with the plaintiff to pay him a certain sum of money, and at the same time gave his notes for the money, as a part of the same transaction—*Held*, that the plaintiff had two remedies, one on the covenant and one on the notes, and that he was at liberty to pursue either. *Byrd v. Knighton*, vii. 443.

2. One of several partners in a chattel may sue and recover for damages to the same, in an action *ex delicto*, unless defeated by a plea in abatement. *Chouteau v. Hewitt*, x. 131.

3. Money advanced by one person to another upon the faith of an agreement that a partnership should be entered into between them, may be recovered back, if the party to whom it is advanced refuses to comply with the agreement. *Kerrigan v. Kelly*, xvii. 275.

b. BETWEEN TENANTS IN COMMON.

4. Tenants in common must join in all personal actions in relation to their common property. *Lane v. Dobyns*, xi. 105.

5. But under the new code one tenant in common may sue another without resorting to the action of account, under the statute of 1845. *Rogers v. Penniston*, xvi. 432.

II. WHEN NOT MAINTAINABLE.

a. GENERALLY.

6. An action for the recovery of possession of land is not maintainable when there has been a contract for its sale, the purchase money paid, and possession delivered in pursuance thereof. *Tibbeau v. Tibbeau*, xix. 78.

7. The officers of certain insurance companies combined together to refuse to insure the property of the plaintiff, and he brought an action on the case, in the nature of a conspiracy, against them—*Held*, that the defendants' refusal to insure being lawful, such action would not lie, however malicious defendants' motives might have been. *Hunt v. Simonds*, xix. 583.

8. The plaintiff, in an action on the case, instituted before the new code was adopted, alleged that the defendant, on a specified day of the month, not naming the day of the week, wrongfully and negligently set fire on his own land, which extended to plaintiff's land, and burned his fence. At the trial, he brought to the notice of the court that the specified day of the month was Sunday, and, the act being unlawful, the defendant was responsible for all the consequences—*Held*, that under this declaration that ground of recovery was not available. *Martin v. Miller*, xx. 391.

9. The voluntary expenditure of work and labor upon the property of another is not of itself sufficient to create a cause of action against the owner. *Carson v. Ely*, xxiii. 265.

b. FRAUD AND FAILURE OF CONSIDERATION.

10. Where a party sold an improvement on public land, erroneously representing himself as entitled to a pre-emption, the vendee cannot recover as for a failure of consideration or for fraud, unless it appears that there was fraud in fact, or that the vendee has sustained actual loss. *Sandford v. Justice*, ix. 855.

c. AGAINST RECORDER OF DEEDS.

11. A recorder of deeds is not liable for giving a false certificate as to the title of property, unless such certificate be made fraudulently, or with a knowledge of its falsity. *Wood v. Ruland*, x. 143.

d. FOR SEDUCTION.

12. A mother cannot maintain an action for the seduction of her daughter, when such seduction occurred during the life of the father, although the birth of the child occurred after his death. *Vossel v. Cole*, x. 634.

e. ON LOST BOND OR NOTE.

13. An action at law will not lie upon a lost bond or note. (But see R. S., 1855, 1240 § 59.) *Cook, J., dis. Edwards v. McKee*, i. 123.

III. COMMENCEMENT.

14. The filing of the declaration, and not the return of the writ, must be regarded as the commencement of the suit. *Dougherty v. Downey*, i. 674.

IV. CONSOLIDATION.

15. A plaintiff holding several notes against a defendant, may bring suit on each of them separately before a Justice, and cannot be compelled to consolidate his actions after he has brought suit on them separately. *Barns v. Holland* iii. 47. *Martin v. Chauvin*, vii. 277.

16. M. sued B. before a Justice on two notes, one of one hundred dollars and the other of fifty dollars. The defendant obtained a separate trial on the one hundred dollar note, and had a judgment against the plaintiff. The cause was then continued as to the fifty dollar note—*Held*, that the Justice had no authority to separate the causes of action, and that his judgment on the larger note was void. *Mass v. Brown*, vii. 305.

17. A. sued B. to recover money paid by him as a security on a note, and subsequently sued C., charging, that at the time of the execution of the note, C. was a secret partner of B., and praying for a consolidation of the two suits. C. denied, by answer, the partnership, but the court consolidated the two suits—*Held*, that this consolidation was irregular. *Peery v. Moore*, xxiv. 285.

18. On appeal from the decision of a Justice, refusing to consolidate suits and dismiss for want of jurisdiction, it must clearly appear, to support the appeal, that several suits were pending before the Justice. *Sykes v. The Planters' House*, vii. 477.

See INFRA IX.; . . . JURISDICTION 21.

V. ASSIGNMENT OF INTEREST IN.

19. During the pendency of a suit, the plaintiff, in writing, transferred his interest in it, and in any judgment he might obtain, as security for a debt, to a third person—*Held*, that this operated as an equitable assignment of the note sued on, and gave to the assignee a right to control the suit, and that the defendant, having notice of the assignment, had no right to compromise with the plaintiff without the consent of the assignee. *Ashby v. Winston*, xxvi. 210.

VI. PARTIES.

a. PLAINTIFFS.

aa. Generally.

20. A debt due from A. to B. by verbal contract, was by B. assigned in writing to C., to whom A., after the assignment, verbally promised to pay it—*Held*, that C. could not, on that promise, maintain an action in his own name against A. *Chauvin v. Labarge* i. 556.

21. A bond was given to the commissioner of school lands, and his successor in office, in pursuance of the act of 1831, (2 Ter. L. 261)—*Held*, that an action on such bond could not be maintained in the name of the commissioner after his powers had been vested in the County Court by the act of

1835, (R. S. 1835, 561,) and the act of 1831 had been repealed. *Casey v. Barcroft*, v. 128.

22. A. executed his bond to C., by which he undertook to pay to a third person a debt due to said third person from C., the latter having placed in C.'s hands certain securities—*Held*, that an action would not lie upon the bond, either at law or in equity, in favor of such third person. *Thornton v. Smith*, vii. 86.

23. A. executed his bond to B., who assigned it to C. Sometime afterwards, C. brought the bond to B. with his assignment thereon erased, and B. thereupon, at the request of C., assigned it to E.—*Held*, that the erasure of the assignment did not divest C. of the legal title to the bond, and consequently, that E. could not sue in his own name as the legal owner thereof. *Davis v. Christy*, viii. 569.

24. A note, made payable to D., agent of the proprietors of the town of S., is payable to D. individually, and suit must be brought on it in his name. *Bryant v. Durkee*, ix. 168.

25. A bond, made payable to the Justices of the County Court, by their names, for the use of the county, should be sued upon in the names of the surviving justices to whom it was executed. *Craig v. Callaway County Court*, xii. 94.

26. Several parties interested in resisting a suit, appointed a committee of their number to employ counsel and conduct the defense, and agreed in writing to pay the committee such *pro rata* assessments as might be made against them to defray the expenses of the defense, and one of the parties to the agreement refused to pay the amount assessed against him, which was thereupon made up by the committee—*Held*, that each member of the committee might sue separately for the amount paid by him. *Finney v. Brant*, xix. 42.

27. And a suit brought by a member of the committee to recover back the amount paid by him, will not be defeated by the mere fact that it was actually paid by a firm to which he belonged, he alone being a party to the agreement, unless it appears that the money belonged to the firm, and was not paid on his account. *Ibid*.

28. A. and B., partners, were indebted to C. A. sold his interest in the partnership to D., who agreed with A. and B. to assume and pay the debt due to C.—*Held*, that C. could not maintain an action in his own name against D. *Manny v. Frasier*, xxvii. 419.

bb. *Party in Interest.*

29. In a suit on an obligation in these words, "I promise to pay to J. B. or J. L.," &c., both obligees must join in the suit. *Bailey v. Thornhill*, i. 711.

30. It is for the court to determine upon a given state of facts, whether a plaintiff is the real party in interest. *Williams v. Whitlock*, xiv. 552.

31. A. deposited funds at a banking house in the name of B., giving him the pass-book and blank checks, with power to draw. B., when applied to, disclaimed all interest in the funds, and voluntarily gave a check for the amount—*Held*, that B. was not a real party in interest, and could not maintain an action against the party receiving the money on the check. *Ibid*.

32. An order drawn for the whole amount of a debt, is an equitable assignment of it, and under the new code the party in whose favor the order is drawn, may bring suit in his own name. *Walker v. Mauro*, xviii. 564. *Smith v. Schibel*, xix. 140.

33. The section in the new code requiring the real party in interest to sue, (Acts 1848-9, 75, § 1,) must be limited to those cases in which the real party in interest possesses the entire cause of action. Thus, where there was an insurance upon a part of a boat which was lost by the negligence of the defendants, and the part insured was abandoned by the owners to the underwriters, and the abandonment thereof accepted—*Held*, that the action for the whole value should be brought in the name of the owners. *Cable v. St. Louis Mar. Railway and Dock Co.*, xxi. 133.

cc. Joinder of Plaintiffs.

34. Where several persons agree, in writing, to contribute towards the defence of a suit, and the proportion of one who fails to comply with his agreement is paid by the others, *pro rata*, they cannot maintain a joint action against him to recover it back, but each must sue separately for his share. *Lindell v. Brant*, xvii. 150.

35. A. gave a bond for the conveyance of a tract of land to B. upon the payment of the purchase money, for which B. gave his notes—*Held*, that the heirs of A. were properly made co-plaintiffs with his administrators, in a suit brought to recover the amount of the notes, in which it was sought to subject the land to the payment of the debt. *Perry v. Roberts*, xxiii. 221.

36. The heirs of an intestate cannot be joined as parties plaintiff with the administrator in a suit for the recovery of damages for the breach of a contract to convey land. *Brueggeman v. Jurgensen*, xxiv. 87.

b. DEFENDANTS.

37. Under the new code any person may be made a party defendant who has an interest in the matter in controversy adverse to the plaintiff; but it does not authorize one to interfere in a cause without leave of court, and the court will not permit persons to become parties whose interests are represented by existing parties. *McLaughlin v. McLaughlin*, xvi. 242.

38. Where a vendee of land brings an action against the vendor to correct a mistake in the deed, the person in possession of the disputed land should not be made a defendant unless he had notice of the facts, or holds under a voluntary conveyance. *Lyon v. Page*, xxi. 104. See SUPRA, 4-5.

See ADMINISTRATION, 18;... AGENCY, VII;... ATTACHMENT, IV;... BILLS OF EX. AND PROM. NOTES, 91;... BOATS AND VESSELS, III;... BOND, VI;... BONDS, NOTES AND ACCOUNTS, 70;... CHANCERY, 112, 129;... COVENANT, 16;... EJECTMENT, 20;... EVIDENCE, 115;... FERRY, V;... GUARDIANS AND CURATORS, IX;... JUSTICE OF THE PEACE, 17;... LIBEL AND SLANDER, II;... LOCAL DECISIONS, II;... PARTITION, 8;... PRACTICE, 18;... REPLEVIN, III.

VII. ABATEMENT BY DEATH.

39. Under the statute, (R. S. 1845, 824, § 18,) where the death of a party is suggested on the record, and his representative does not enter an appearance by the third day of the second term next after the term in which his death is suggested, a *scire facias* for the purpose of substituting a party will not lie, and the suit will abate without motion. *Ranney v. Bostic*, xv. 215.

40. A failure to make all the representatives of a deceased plaintiff and a deceased defendant parties to the suit on or before the third term after the suggestion of the deaths, (R. S. 1845, 850, § 19,) will cause the suit to abate only as to those representatives not brought in and made parties; it is error to abate the suit entirely. *Farrell v. Brennan*, xxv. 88.

See *INFRA*, VIII.

VIII. SURVIVORSHIP AND REVIVAL OF.

a. SCIRE FACIAS TO REVIVE.

41. Where, upon the decease of the plaintiff, his administrator is made a party without the appearance of the defendant or notice to him, the irregularity will be cured by the appearance of both parties at a subsequent term, and the granting of a continuance on the motion of defendant. *Farrell v. Brennan*, xxv. 88.

42. Where a party has appeared without a *scire facias*, and moved to set aside an order of substitution of a new administrator for another administrator who has been plaintiff in an action against him, and that motion is overruled, and the order set aside on appeal, no *scire facias* is necessary, after the cause is remanded to bring him into court. *Ferris v. Hunt*, xx. 464.

43. Under the new practice, where either party to a suit dies, it may be continued in the name of the representative in interest only upon the voluntary appearance of the adverse original party, or after the service upon such party of a *scire facias*. The sixteenth section of article five of the practice act of 1845, (R. S. 1845, 824,) is not repealed by the new code. *Ferris v. Hunt*, xviii. 480.

44. And although a party may be substituted for one deceased, on motion, yet it can only be on the voluntary appearance of the adverse original party, or after the service upon such party of a *scire facias*. *Fine v. Gray*, xix. 33.

45. The provision in the statute (R. S. 1845, 824, § 18) that a *scire facias*, for the substitution of a plaintiff in the place of the original must be sued out before the expiration of the third day of the second term next after the term at which the death or disability of the original party shall be stated upon the record, is not repealed by the new code. *Ibid*.

b. IN PARTICULAR CASES.

aa. *Ejectment*.

46. Where the plaintiff in an ejectment suit dies, the suit may be revived in the name of his heirs and devisees. *Fine v. Gray*, xix. 33.

bb. *Falsæ Return.*

47. A right of action against a sheriff for a false return on an execution, survives against his administrators. *Jeppett v. Weaver*, x. 234.

cc. *Common Carrier—Damages.*

48. An action by a father against a common carrier, for damages arising from the death of his son, which was occasioned by the defendant's negligence, survives to the plaintiff's representatives; but damages are limited to the actual value of the son's services to the estate. *James v. Christy*, xviii. 162. (See R. S. 1855, 647, §§ 2-4.)

dd. *Master and Slave.*

49. An action under the statute (R. S. 1845, 414, § 35) against the owner of a slave, will survive against his administrators. *Phillips v. Towler*, xxiii. 401.

ee. *Mechanics' Lien—Scire Facias.*

50. Where the owner of real estate dies, pending a proceeding by *scire facias* to enforce a mechanic's lien, the suit must be revived against his heirs, and not against his personal representatives. *Belcher v. Schaumburg*, xviii. 189.

ff. *Replevin.*

51. Replevin, being an action strictly in tort, abates on the death of the defendant, and cannot be revived against his administrator. *Rector v. Chevalier*, i. 345.

52. But under the statute of 1835, (R. S. 1835, 48, §§ 24, 25,) an action in replevin does not abate by the death of both the parties to the action, but may be continued by their personal representatives. *Kingsbury v. Lane*, xxi. 115.

53. Still, under this statute, the action did not survive against the administrator of a deceased party where the damages to be recovered for the detention came down to the time of the verdict, and so embraced damages for which the administrator alone was personally liable. *McDermott v. Doyle*, xvii. 362.

gg. *Trespass.*

54. Under the statute (R. S. 1845, 76, § 25,) an action lies against the administrator of one who has, in his lifetime, committed a trespass. *Froust v. Bruton*, xv. 619.

hh. *Trover.*

55. An administrator may maintain an action of trover in every case where the deceased might have done so in his lifetime. *Smith v. Grove*, xii. 51.

ii. *Forcible Entry and Detainer.*

56. In a proceeding for forcible entry and detainer, the death of one joint plaintiff does not abate the suit. *Carlisle v. Rawlings*, xviii. 166.

57. And the survivor may recover all the damages sustained by the forcible entry and detainer. *Keyser v. Rawlings*, xxii. 126.

See SUPRA, VII.

IX. SPLITTING A CAUSE OF ACTION.

58. A plaintiff having an entire demand growing out of a single transaction, cannot split it up into separate suits. *Wagner v. Jacoby*, xxvi. 532. See SUPRA, IV.

See ADMINISTRATION, VIII, IX;....ALIENS, 3, 4;....ARBITRATIONS AND REFERENCES, VI;....BILLS OF EXCHANGE AND PROMISSORY NOTES, XII;....BONDS, NOTES AND ACCOUNTS, V;....CONTRACT, X;....CORPORATION, V, IX. 34;....COVENANT, 13;....DEBT, I;....EJECTMENT, II;....GAMING, II, III;....HUSBAND AND WIFE, 5-14. XI;....INFANTS, III;...JUDGMENT, XIII;...JUSTICE OF THE PEACE, II;....LANDLORD AND TENANT, 22;....MORTGAGE, VII;....RECOGNIZANCE, I. 18;....REPLEVIN;....REVENUE, 34. VII;....USES AND TRUSTS, 23.

ADJOINING PROPRIETORS.

1. The owner of soil has no right so to excavate it as, by the removal of lateral pressure, to cause that of the abutting proprietor to fall; but if that proprietor have built upon the verge of his land, he can exact no more than reasonable care of his neighbor in excavating, to prevent damage to the building, except there be a grant or prescription. *Charless v. Rankin*, xxii. 566.

2. It is not sufficient that the party making the excavation used all the care that a skillful and careful builder judged necessary; nor is he bound to use the same caution that a prudent man, experienced in such work, would have employed, who owned both lots. The question in such a case is, whether there was actual negligence. *Ibid.*

See BOUNDARY AND DESCRIPTION, 15.

ADMINISTRATION.

I. GRANT OF ADMINISTRATION.

- a. TIME AND MODE OF GRANTING—VALIDITY.
- b. NOTICE OF GRANT.
- c. EVIDENCE.

II. TO WHOM GRANTED.

III. ADMINISTRATION BOND.

- a. SUFFICIENCY.
- b. ACTION UPON.
 - aa. Form.
 - bb. Parties.
 - cc. Pleading.
 - dd. Evidence.
 - ee. Judgment, Execution and Distribution.
 - ff. When it may be commenced, and Limitation of.
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- c. LIABILITY OF THE PRINCIPALS TO THEIR SURETIES.
- d. LIABILITY OF SURETY.
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IV. ASSETS—PRINCIPAL AND ANCILLARY ADMINISTRATION OF.

V. CONCEALING ASSETS.

VI. RIGHTS AND LIABILITY OF REPRESENTATIVE.

VII. POWER OF REPRESENTATIVE.

VIII. ACTION BY REPRESENTATIVE.

IX. ACTION AGAINST REPRESENTATIVE.

X. PRESENTATION, ALLOWANCE, AND CLASSIFICATION OF DEMANDS.

- a. PRESENTATION, NOTICE AND AFFIDAVIT.
- b. ALLOWANCE AND CLASSIFICATION.

XI. LIMITATION.

- a. DEMANDS AGAINST AN ESTATE.
- b. IN FAVOR OF AN ESTATE.
- c. CLAIMS AGAINST ADMINISTRATOR.
- d. PLEADING.

XII. DISTRIBUTION.

XIII. SALE.

- a. RIGHT OF ADMINISTRATOR TO PURCHASE AT.
- b. SALE OF PERSONALTY.
- c. SALE OF SLAVES.
- d. SALE OF REALTY.
 - aa. Proceedings to Obtain an Order.
 - bb. Notice of Sale.
 - cc. Conditions and Requisites.
 - dd. Setting Aside.
 - ee. Deed.
 - ff. Purchase of Equitable Interest and rights acquired thereby.

XIV. SETTLEMENT.

XV. COMPENSATION OF REPRESENTATIVE.

XVI. PARTNERSHIP.

XVII. DEVASTAVIT.

XVIII. EXECUTOR DE SON TORT.

XIX. ADMINISTRATOR DE BONIS NON.

XX. PUBLIC ADMINISTRATOR.
XXI. WIDOWS AND THEIR RIGHTS.
XXII. INSOLVENTS' ESTATES.

I. GRANT OF ADMINISTRATION.

a. TIME AND MODE OF GRANTING.—VALIDITY.

1. Letters of administration granted by a deputy clerk in his own name are void. *Stewart v. Cave*, i. 752.

2. There can be only one set of administrators at the same time on the same estate, and it is no objection to the letters first granted that they were not signed by the clerk of the court granting them, until set aside for that cause. *Post v. Caulk*, iii. 35.

3. The county court is not warranted in granting letters of administration to a stranger, until the expiration of the sixty days prescribed by statute, or before the other requisites thereof are complied with. (R. S. 1835, 41, §§ 5-7.) *Mullanphy v. County Court*, vi. 562.

4. The order of the county court is a sufficient appointment of an administrator, without any formal letters, if the party give the bond and take the oath required. *The State v. Price*, xxi. 434.

5. An illegality in the grant of letters of administration cannot be taken advantage of in a collateral proceeding. *Riley v. McCord*, xxiv. 265.

b. NOTICE OF GRANT.

6. The publication of the notice of the grant of letters of administration, required by the statute, (R. S. 1835, 47, § 19,) need not be completed within thirty days from the grant; it is sufficient if the publication of notice is begun within that time. *Montelius v. Sarpy*, xi. 237.

See INFRA, 103.

c. EVIDENCE.

7. A copy from the record of the county court of the grant of letters of administration, is admissible evidence without producing the letters themselves, to prove that the person mentioned in said grant as administrator, is the duly authorized administrator. The statute which makes the letters when, and only when recorded, evidence (R. S. 1825, 96, § 12), does not interfere with the general law of evidence, or make the letters the only evidence of the fact of administration. *Lane v. Clark*, i. 657.

8. Possession of letters of administration is *prima facie* evidence of delivery. *McNair v. Dodge*, vii. 404.

9. The act of January 20, 1816, (1 Ter. L. 441, §§ 1, 2,) providing that all letters of administration theretofore granted should be recorded, and that the same should not be admitted in evidence, unless recorded, was intended simply to furnish a rule of evidence, and a repeal of that law was a repeal of the rule. The act of January 12, 1822, (1 Ter. L. 222, § 13,) as well as the subsequent laws on the subject of administration, were not intended to have a retrospective operation. *McNair v. Dodge*, vii, 404. *Hensley v. Dodge*, vii, 479.

10. Although an appeal will lie from an order of court revoking letters of administration, yet, where the revocation is made for the reason that a will had been found and admitted to probate, the Circuit Court cannot, on such appeal, inquire into the sufficiency of the proof upon which the Probate Court acted in granting probate of the will. *Duty, Ex parte*, xxvii, 43.

II. TO WHOM GRANTED.

11. The act of February 21, 1825, (R. S. 1825, 93, § 3,) declared that no "married woman shall act as executor or administrator," and §. 15 of the same act declared that "where any *feme sole* executrix or administratrix shall marry, the marriage shall operate an extinguishment of her powers and her letters shall be revoked and repealed"—*Held*, that these sections have no retrospective operation, and that until the Probate Court have taken steps to revoke and annul the letters of an administratrix who had married before the passage of that act, she will continue to be *de jure* and *de facto* administratrix. *Frye v. Kimball*, xvi, 9.

12. Although an appointment of an executor would be rendered void by reason of the fact that such appointee is also one of two attesting witnesses, he may be appointed administrator with the will annexed. *Murphy v. Murphy*, xxiv, 526.

III. ADMINISTRATION BOND.

a. SUFFICIENCY.

13. An administrator's bond containing more conditions than is required by the statute is still a statutory bond. *Woods v. The State*, x, 698.

14. The grant of letters of administration and the execution of the bond are parts of one and the same transaction, and they may be taken together to show what was intended. If the Christian name of the deceased is left out of the bond, but inserted in the letters, there is a sufficient description to ascertain the estate referred to, and the letters, if the bond refers to them, may be produced to explain the ambiguity. *The State v. Price*, xv, 375.

15. An administrator's bond is valid against him, although not approved by the court. *Henry v. The State*, ix, 769. *James v. Dixon*, xxi, 538.

16. The statute which prohibits an attorney at law from being taken as security upon an administration bond, (R. S. 1835, 43, § 16,) is merely directory, and

was not designed to avoid the bond where the law has been disregarded. *Hicks v. Chouteau*, xii. 341.

b. ACTION UPON.

aa. *Form.*

17. An action of covenant will not lie on an administrator's bond. The action should be debt. *Clark v. Murphy*, i. 114.

bb. *Parties.*

18. Where the law gives to any party interested a right to sue on an administrator's bond, (1 Ter. L. 934, § 49,) it is not necessary that a suit upon it should be to the use of all the parties interested in the estate. *Oliver v. Crawford*, i. 263.

19. A bond given to "T. O., Judge of Probate, &c., and his successors in office," in conformity to law, (1 Ter. L. 58, § 5,) may be sued on in the name of that officer after he has ceased to hold office, and, in consequence of the repeal of the law under which his office existed, there was no successor. The Judge of Probate in such a case is regarded as a trustee, having the legal right to sue, and the repeal of the law did not divest that right. *Ibid.*

20. A bond given to "W. C., Governor of the Territory of Missouri," must be sued in the name of the Governor; and a party injured cannot sue on the bond in his own name. *Spear v. Thompson*, i. 581.

21. An administration bond is joint and several, and may be put in suit by any one aggrieved against any one of the obligors, as soon as a breach of it is committed by the principal. *Devore v. Pitman*, iii. 179. *Oldham v. Trimble*, xv. 225.

22. Such a bond, executed to a Probate Judge under the territorial government, must, under the revised statutes of 1825, (p. 95, § 9,) be sued on in the name of the State of Missouri. *M'Girk, J., dis. Governor v. Hays*, iii. 434.

23. A prior and a subsequent administrator of the same estate cannot be sued jointly on their separate bonds. *Ibid.*

24. Suit on the bond must be brought in the name of the State. *The State v. Campbell*, x. 724. *Sickles v. McManus*, xxvi. 28.

25. And such suit may be instituted by any person injured by a breach of the bond. Thus, an heir or distributee of an estate may sue in the name of the State for a failure to account for money received, and their right of action accrues as soon as the failure occurs. *The State v. Campbell*, x. 724.

cc. *Pleading.*

26. In a suit on an administrator's bond against the securities, where the securities pleaded the death of the administrator before the time for filing the inventory, and in the same plea denied that goods, &c., had come into the hands of the administrator—*Held*, that the first part of this plea was mere matter of inducement, and not traversable. *Scott v. Governor*, i. 686.

27. A breach of a bond, setting out a failure to make an annual or final settlement, is well assigned. *Devore v. Pitman*, iii. 179.

28. A petition against an executor and his securities, on their bond, alleging waste and a refusal to pay a demand allowed by the court, must aver an order of court for its payment, or that assets have come to the hands of the executor, which ought to have been, or could lawfully be, applied to its payment. *The State v. Modrell*, xv. 421.

29. A suit having been brought on the bond of the executor of an executor, to constitute a breach it is necessary to allege that neither the executor in his lifetime, nor his executor since, have performed the acts required by law, or the order of the court. There is no foundation for the objection that such an allegation makes the declaration fatally defective for misjoinder of actions. *The State v. Petticrew*, xix. 373.

dd. *Evidence.*

30. In an action on an administration bond against a surety, evidence that the administratrix was seen in possession of money, and that she said a part of it was left with her by the deceased a short time before his death, and that the rest was brought to her by a person who was sent to ascertain the circumstances of his death, is admissible. *Governor v. Byrd*, ii. 194.

31. In an action of debt on a bond, against an administrator who had been removed for refusing to pay over to the administrator *de bonis non*, the moneys, &c., in his hand belonging to the estate of the deceased, it is not necessary to show a final settlement with the displaced administrator and an order of payment made thereon. *The State v. Porter*, ix. 352.

32. In an action on an administrator's bond, where the breach assigned was that the administrator had failed to account for assets of the estate, and had converted the same to his own use, and the plea was the statutory plea of the general issue, it was *held*, that proof that assets had come to the hands of the administrator did not make a *prima facie* case for the plaintiff. *The State v. Price*, xvii. 431.

ee. *Judgment, Execution and Distribution.*

33. In a suit by legatees, on an administrator's bond, judgment should be entered for the penalty, and a single execution awarded for the damages assessed for the breaches. Distribution is to be made after the damages are brought into court. *The State v. Ruggles*, xx. 99.

34. Where an administrator, who was sued on his bond, agreed with the plaintiffs that judgment should be rendered against him for a certain sum, and that there should be set off against the execution whatever the County Court should find due to him, and the County Court brought him in debt to the estate, it was *held*, that execution should issue for the amount of such indebtedness. *Wilkson v. The State*, xii. 353.

ff. *When it may be Commenced and Limitation of.*

35. For a breach of the conditions of an administration bond, suit may be brought for the use of the heirs and distributees of the estate within less than three

years from the granting of letters of administration. *The State v. Stephenson*, xii. 178.

36. An action on an administrator's bond will not lie in favor of one claiming to be a creditor of the estate, until his demand has been established as prescribed by statute; hence the statute of limitations will not run in favor of the administrator in such a case, until such demand is so established. *The State v. St. Gemme*, xxiii. 344.

gg. *Costs.*

37. When a guardian puts a bond in suit for his own use, he can only recover costs paid by himself; to recover costs for his wards, the suit must be to their use. *Devore v. Pitman*, iii. 182.

C. LIABILITY OF THE PRINCIPALS TO THEIR SURETIES.

38. Executors who have given a joint bond, with security, for the faithful performance of their trust, are jointly liable as principals, to indemnify the surety who has been subjected for the default of one of them. *Dobyns v. McGovern*, xv. 662.

39. And the representatives of a deceased administrator are responsible to the securities in the administration bond for any thing they may have had to pay on account of the defalcations of the co-administrator, after his becoming the surviving administrator, and after he received, by order of the County Court, from the executor of the deceased administrator, all the effects the latter had received. *Ibid.*

d. LIABILITY OF SURETY.

40. The securities of an administrator are not bound for debts due the intestate from the administrator at the time of the intestate's death. *Scott v. Governor*, i. 686.

41. Damages may be assessed against an administrator's securities for neglect of the administrator to file an inventory. *Ibid.*

42. After P. had become security for H. on an administration bond, a law was passed authorizing administrators, on leave of court, to retain in their hands the money of minors, paying interest thereon. In pursuance of this law, H. obtained leave to retain certain moneys which he afterwards wasted and became insolvent. In a suit against the security, he was allowed to show in his defense, that the principal had wasted the money during the time it was so loaned to him by the court. *Devore v. Pitman*, iii. 182.

43. The securities of an administrator are liable for his misapplication of the rents and proceeds of the lands belonging to the estate. *Stong v. Wilkson*, xiv. 116.

44. A claim against the principal and securities on an executor's bond, founded upon the misconduct of the executor, is a claim against them in their individual capacity, and an indebtedness of the plaintiff to the testator, in his lifetime, cannot be set off against it. *The State v. Modrell*, xv. 421.

45. The bond of an executor is broken by his failure to make a complete inventory of the estate, and the securities are liable for a failure on his part to inventory and account for money of the estate which was received by him after the death of the testator, and before the granting of the letters testamentary. *Sherwood v. Hill*, xxv. 391. See SUPRA, 41.

See INFRA, 60, 120.

e. ACTION AGAINST SURETY.

46. A creditor, after he obtains a judgment against the administrator, is not bound to proceed to execution and return thereon before he can maintain his action on the bond against the surety. *Governor v. Chouteau*, i. 731, 771.

47. If a debt is recovered against an administrator, and he, having means, neglects to pay it when he ought, this is mal-administration, and amounts to a breach of the bond. *Ibid*.

48. The creditor is not compelled to obtain an order of the Probate Court for the payment of his judgment debt before he can maintain an action on the administrator's bond against the security. *Ibid*. *

49. Money received by an administratrix from the sheriff on an overplus made on a sale of a part of the intestate's real estate on judgment and execution, is assets, and as such covered by the administration bond, and if not "duly administered," the securities are liable. *Ibid*.

50. In a suit against securities on a deceased administrator's bond, it is not necessary to aver that an administrator on his estate had been appointed, and that he had not paid the sum alleged to be in arrear from the deceased administrator. *Finney v. The State*, ix. 624.

IV. ASSETS—PRINCIPAL AND ANCILLARY ADMINISTRATION OF.

51. The property of every person who dies in this State, whether citizen or stranger, is subject to the course of administration provided by our statutes, and is regarded as in the custody of the law for the benefit of all persons interested therein. *Bartlett v. Hyde*, iii. 490.

52. A. died intestate in Illinois, leaving debts in that State and also in Missouri. B. administered in Illinois, and, "as administratrix," insured the real estate of A., situate in Illinois, in an office in the city of St. Louis. The property was destroyed by fire, and B. sued for and obtained judgment for the amount due on the policy. D. administered on the estate of A. in Missouri, its only assets consisting of the amount due on the policy—*Held*, that the administrator in this State was not entitled to the amount due on the policy, but that it belonged to the Illinois administratrix. *Abbott v. Miller*, x. 141.

53. Administration of all the goods of an intestate, wherever situated, will be made according to the law of his domicile. If they are in a different country, they will, under the laws thereof, be first applied to the satisfaction of demands established under those laws; and if any of its citizens claim as distributees, dis-

tribution will there be made. But when these claims are satisfied, if there are creditors or distributees in the country of the intestate's domicil, the tribunals of the country where the assets are found will direct them to be remitted to the country of the domicil for further administration. *Spraddling v. Pipkin*, xv. 118.

54. The domicil of the deceased determines whether or not his assets shall be transferred from one State to another for administration. In whatever State the domicil may have been, the administration there granted is the principal one, and that in any other State is ancillary, and priority in administration has no effect upon the rule. *Ibid.* (See *STEVEN v. GAYLOR*, 11 Mass. Rep., 263.)

55. If the record shows a case where, on application, a transfer of assets would have been ordered from one State to another, a transfer made by the administrator without such order, completes his administration, and vests the title thereto in the administrator appointed in the State to which the transfer is made, so that an administrator *de bonis non*, appointed in the State from which they were removed, cannot claim them as unadministered assets. *Ibid.*

56. If a foreign administrator fraudulently converts assets transferred to him, and brings them again into the State whence they were removed, an administrator *de bonis non*, appointed in said State, cannot recover them in an action of detinue; they can only be reached by a bill in equity. *Ibid.*

See *INFRA*, 108, 109, XII.

V. CONCEALING ASSETS.

57. A son administered on the estate of his father, and in that capacity hired out "Hannah," a slave, as the property of the estate, at the same time claiming to hold "Nancy," another slave of less value, by purchase from his father, in his lifetime. The son died, and his administrator was sued for the recovery of "Nancy," on the ground that she was, in fact, the property of the estate of the father, and that the son fraudulently or by mistake returned "Hannah," in lieu of her, who had since died—*Held*, that the acts of the son as administrator of his father, in hiring out the more valuable slave as the property of the estate, were against his interest, and might therefore be received in evidence. *Irving v. Irving*, v. 28.

58. Under the statute (R. S. 1845, 74, §§ 9–11,) a creditor of an estate cannot maintain an action in the County Court against the administrator for concealing or embezzling property of the estate. *Powers v. Blakey*, xvi. 437.

59. And a proceeding under that statute is inapplicable, where the person charged with unlawfully detaining the effects has really no control over them at the time the complaint is made against him. *Dameron v. Dameron*, xix. 317.

VI. RIGHTS AND LIABILITY OF REPRESENTATIVE.

60. An intestate's effects were sold under an execution, and there being a surplus in the hands of the sheriff after satisfying the execution, a receipt was given

for it by the administrator, who never actually received the money—*Held*, that in whatever manner such surplus may have been applied, the administrator must account for it, and unless he does, his security will be liable; nor will the fact that the party suing is himself administrator of such estate in another State, and has assets in his hands, affect the liability of the security. *WASH, J., dis. Chouteau v. Hill*, ii. 177.

61. A. died, leaving a will, by which he devised all his estate to his widow, to be held during her widowhood, and made her executrix during such widowhood. The widow entered upon the discharge of her duties as executrix, and contracted debts for the benefit of the estate, for which she gave her private note. She then intermarried with one M.—*Held*, that the administrators of the estate, appointed after the marriage, agreeably to the provision of the will, were liable to M. for the amount of the notes, as for so much money paid to the use of the estate. *Maupin v. Boyd*, v. 106.

62. Where executors give their own notes for a debt in which their testator was surety and indemnified, and pay the same, they will be entitled to be paid in full out of the estate. *Hill v. Buford*, ix. 859.

See *INFRA*, 121.

VII. POWER OF REPRESENTATIVE.

63. Where land is purchased with money in the hands of an administrator for the express purpose of being subjected to the payment of the debts of the deceased, there is nothing in the policy of the law prohibiting the administrator from conveying it. *Hogan v. Welcker*, xiv. 177.

64. A resulting trust is an equitable estate, and can be sold by an administrator. *Valle v. Bryan*, xix. 423.

65. Under the statute (R. S. 1845, 88, §§ 36–39,) the Probate Court may order an administrator to execute specifically a contract of his intestate to make a deed of land after she became of age, confirmatory of one given during minority, upon proof that she affirmed the contract verbally after she became of age; receiving part of the consideration money, and expressing herself satisfied, is a sufficient ratification. *Ferguson v. Bell*, xvii. 347.

See *INFRA*, 146–7.

VIII. ACTION BY REPRESENTATIVE.

66. Where an administrator is authorized by law (1 Ter. L. 931, § 41,) to lease real estate of his intestate, it is not necessary, in an action for the rent, that he should set forth in his declaration an authority from the County Court to make the lease under which the rent accrued. *Rector v. Ranken*, i. 371.

67. A note made payable to A. and R. “as executors of R.” may be sued on by them as executors. *Rector v. Langham*, i. 568.

68. A bond executed to a person as administrator is an admission of his representative character, and the obligor is estopped from afterwards denying it. *Jones v. Snedecor*, iii. 390.

69. An administrator with the will annexed may sue on a covenant to the testator to convey land. *Laberge v. McCausland*, iii. 585.

70. The administrator should allege a request to the covenantor to convey to the individual entitled to the land, whether the heir at law or devisee. *Ibid.*

71. An administrator cannot sue his co-administrator at law. *Martin v. Martin*, xiii. 36.

72. An action cannot be maintained by an executor or administrator as such to recover damages for trespass upon the realty belonging to the estate of the testator or intestate, it must be brought in the name of the heir or devisee. *Aubuchon v. Lory*, xxiii. 99.

73. Where an administrator suffers himself to be charged with the receipt of a debt due the estate, which had never been paid, and a judgment is rendered against him for a balance, he may afterwards, in his character of administrator, sue for and recover the debt. *Shore v. Coons*, xxiv. 553.

74. In a suit by a public administrator, the defendant cannot require him to show that the facts exist which authorize him to administer. *Wetzell v. Waters*, xviii. 396.

75. In an action by an administrator in his own name in this State, on a judgment recovered in the State where he was appointed in his representative capacity, in the absence of proof it will be presumed that the courts of that State exercised lawful jurisdiction, and the judgment will be taken *prima facie* to vest in him a title to the money recovered, for which he may sue in his own name here. *Hall v. Harrison*, xxi. 227.

76. In a suit by an administrator upon a note of his intestate, it is no defence that the County Court had allowed a former administrator, upon settlement, credit for the amount of the note. *Henderson v. Henderson*, xxi. 379.

77. Although an administrator should be released by the Probate Court from liability for an inventoried debt on the ground that it had been improperly inventoried, this cannot be set up as a bar to an action brought by him for such debt. *Shore v. Coons*, xxiv. 553.

See DEMAND 4 ; . . . SET-OFF, 28, 29.

IX. ACTION AGAINST REPRESENTATIVE.

78. The authority of an administrator being revoked on his becoming a non-resident, he cannot be a party to a suit in his administrative capacity. *Chouteau v. Burlando*, xx. 482.

79. Where an administrator's account, on a settlement before the court, shows that he has no cash, but only property in his hands, and the court makes an order that all demands of a particular class be paid, it is upon the implied condition that funds sufficient for that purpose must first come into

his hands, and a creditor of that class, who sues out a *scire facias* to compel payment of his demand, must show that the property has been converted into cash. *Polk v. Farar*, xii. 356.

80. In an action by a child against his mother's administrator for money received by her as his guardian, the administrator cannot set up a claim for the support and education of her child by the intestate, when there is no evidence that she ever intended to make a charge therefor. *Guion v. Guion*, xvi. 48. (See *Cummins v. Cummins*, 8 Watts, 366. *Whipple v. Dow*, 2 Mass. 418.)

81. In a suit against administrators, upon a debt of their intestate, judgment should be rendered against them *de bonis testatoris* and not *de bonis propriis*. *Laughlin v. McDonald*, i. 684.

82. In a suit against the executor or administrator of a guardian who had been removed for money not paid over to his successor, the judgment must be *de bonis testatoris*, and not *de bonis propriis*. *Finney v. The State*, ix. 225.

83. A. *cestui que trust* filed a bill in Chancery against the trustee, to get the legal title to the trust property. The administrator of the deceased grantor, in the deed of trust, on his application, was made a party defendant. During the trial, the plaintiff dismissed the suit as to the trustees—*Held*, that judgment could not be rendered against the administrator on a demand against the estate growing out of the trust property. *McLaughlin v. McLaughlin*, xvi. 242.

See CHANCERY 31.

X. PRESENTATION, ALLOWANCE AND CLASSIFICATION OF DEMANDS.

a. PRESENTATION, NOTICE AND AFFIDAVIT.

84. A party in notifying an administrator of a claim against an estate, must specify in the notice the nature of the claim, and in whose right it is prosecuted. (R. S. 1835, 56, § 10.) *Dorsey v. Burns*, v. 334.

85. Where the affidavit required of a claimant, presenting a demand against an estate for allowance, is made by an agent, it must appear from the affidavit itself that the agent had "the management and transaction of the business out of which such demand originated," or that he "had the means of knowing personally the facts required to be sworn to." (See R. S. 1845, 92, §§ 9-11.) *Peter v. King*, xiii. 143.

86. A. and B. were joint owners of a claim secured by a lien on certain real estate. B., by an instrument separate from that evidencing the security, assigned his interest in the claim to C., and afterwards died. A. administered on his estate, and had knowledge of the assignment—*Held*, that he was not bound, as administrator, to take notice of the assignment, but that C. should have exhibited his demand the same as any other creditor of the estate. *Simonds v. Pettibone*, iii. 330.

87. The fact that a demand is made out against the deceased or the administrator, will not justify a refusal to hear evidence in support of it. *Coots v. Morgan*, xxiv. 522.

88. Under a notice to an administrator that a demand will be presented for allowance against the estate "at the next term of the court of and for N. M. County, to be holden in the town of N. M., in said county and State, on the 8th day of May, 1854," the demand may be presented and allowed on the 9th day of May. *Phillips v. Russell*, xxiv. 527.

See ERROR, 15; . . . INFRA, 97.

b. ALLOWANCE AND CLASSIFICATION.

89. To change the class to which the Probate Court has assigned a demand against an estate, is to change the force of the judgment as to all creditors in the prior class, and it should not be done, but upon such facts only as would authorize the court to set aside or modify its judgment in other particulars; and the fact that the claimant had evidence of the prior presentation of the demand to the executor, which he neglected to offer to the Probate Court at the time the demand was allowed and classified, does not authorize the Court to change the class afterwards. Nor can the claimant rely upon the report of the executor, as it is not evidence of classification, not being made for that purpose. *Miller v. Janney*, xv. 265.

90. The statute does not require that a classification of a demand should be entered on the record at large. An endorsement of its class on the claim itself, and an entry on the abstract book is sufficient to give the classification validity. *Nelson v. Russell*, xv. 356.

91. The classification of a demand against an estate, if erroneous, should be appealed from when made. The County Court has no authority to change it at a subsequent term, after the administrator has exhausted the assets in the payment of debts. *Ibid.*

92. A suit commenced against an administrator on a note of the deceased within the first year of the administration, is a legal exhibition of the claim, and entitles it to be placed in the fifth class, although a non-suit is taken in the case owing to instructions given by the court touching the liability of co-defendants. *Scott, J., dis. Tevis v. Tevis*, xxiii. 256.

93. Where a demand against an estate is presented to the County Court for allowance, and is disallowed, the decision of the court is a judgment, and is attended with all the consequences of a judgment of a court of record at common law; and if an appeal is not taken therefrom, the matter becomes *res adjudicata*. *McKinney v. Davis* vi. 501.

94. The allowance of a claim against an estate is a judgment, and will be respected as such, but there is difficulty in maintaining that such allowances are liens upon the estate. The administrator has no interest in the real estate to which a lien can attach. *Kennerly v. Shepley*, xv. 640.

95. Where a judgment against the deceased is presented in the County Court

for allowance, against his estate, it is the duty of the court to classify it for payment. *Wood v. Ellis*, xii. 616.

96. And where a judgment has been rendered against a person during his lifetime, it need not be allowed as a demand against his estate; a transcript of the judgment should be filed in the Court of Probate, and the court will determine its class. *City of Carondelet v. Desnoyer*, xxvii. 36.

97. In presenting a judgment for allowance against an estate, the same notice is required as in the presentation of other demands; and if it be not given, the allowance is unauthorized, and may at any time be set aside on the application of the administrator. *Bryan v. Mundy*, xiv. 458.

98. Under the administration act classifying demands, (R. S. 1845, 90, § 1,) only domestic judgments can be placed in the fourth class. Foreign judgments have no preference over simple contract debts. And this preference of domestic judgments is not repugnant to the Act of Congress of 1790. (1 U. S. Stat., 122.) *Harness v. Green*, xx. 316. See *McElmoyle v. Cohen*, 13 Pet., 312.

99. Where a demand in behalf of one estate is presented against another, the same person cannot act as the administrator of both estates in that matter; and should a demand be allowed under such circumstances against one of the estates, the proceeding will be null. *The State v. Bidlingmaier*, xxvi. 483.

See JUDGMENT, 62; . . . NEW TRIAL, 7; . . . SUPRA, 36.

XI. LIMITATION.

A. DEMANDS AGAINST AN ESTATE.

100. The statute provided that all claims and demands which shall not be exhibited to the administrator or executor within five years after the granting of letters, shall be forever barred. (1 Ter. L., 923, § 18.) *Held*, that this statute does not enlarge the time of limitation, and prevent a claim against the intestate or testator upon which the cause of action had accrued during his lifetime, from being barred by the regular operation of the statute, notwithstanding suit may have been brought within five years after the granting of letters. *Labeaume v. Hempstead*, i. 772.

101. Where a cause of action accrues after the granting of letters of administration, the limitation of three years begins at the time the right of action accrued. *Finney v. The State*, ix. 225.

102. Thus, where the cause of action in favor of a security against an estate did not accrue until the lapse of three years after the grant of letters of administration, the claim is not barred. *Miller v. Woodward*, viii. 169.

103. The limitation of three years does not apply to demands against an estate, unless the executor or administrator gives notice of the grant of letters, testamentary, or of administration, as required by law. *Wiggins v. Lovering*, ix. 259. *Hawkins v. Ridenhour*, xiii. 125. *Bryan v. Mundy*, xvii. 556.

104. The limitation of three years for the presentation of demands against estates, (R. S. 1835, 55, § 2,) applies to suits in all other courts as well as to those before the County Court. *Monteluis v. Sarpy*, xi. 237.

105. Letters of administration were granted January 12, 1852, and a demand was exhibited January 12, 1853—*Held*, that the demand was exhibited "within one year after the granting of the first letters." *Kimm v. Osgood*, xix. 60.

106. A., owning a lot of ground, gave his bond to convey it to B., (which was duly recorded,) and afterwards "granted, bargained and sold" the same lot to C., and C., by a deed of the same tenor, conveyed to D. B. afterwards brought a suit to compel a specific performance of the bond against A.'s administrator, and obtained a decree directing the administrator to convey, which was done. The deed was dated more than three years after the date of the letters of administration—*Held*, that the right of D. to recover for the breach of the covenants contained in the words "grant, bargain and sell," in the deed of A. to C., was not barred by a failure to exhibit the claim against the estate of A. before the expiration of the term of three years from the date of the letters of administration. No demand accrued against the estate of A. until the date of the administrator's deed. *Chambers v. Smith*, xxiii. 174.

107. A demand against an estate on account of the breach of the statutory covenant of seizin, and against incumbrances, is not barred by not having been exhibited against the estate within three years after the granting of letters of administration, where the right of substantial recovery did not accrue before the lapse of that time. *Ibid*.

b. IN FAVOR OF ESTATE—ADVERSE POSSESSION.

108. Adverse possession of the slaves of an intestate for a period of eighteen years after the death of intestate, and before the appointment of an administrator, as there was not, before administration taken, any person who could bring suit, did not amount to a bar to an action for recovery of said slaves, brought by the administrator immediately after his appointment. *McDonald v. Walton*, i. 726.

109. Where administration was taken in 1826 on an intestate's estate, after the lapse of eighteen years from his death—*Held*, that the administrator was entitled to the possession of slaves belonging to the intestate at the time of his death, and might recover them in an action of detinue, notwithstanding the long-continued possession of the widow and those claiming under her; and notwithstanding, the widow, under the laws of Kentucky, where the intestate died in possession of the slaves, was entitled to inherit said slaves from her husband, on account of the failure of all other persons capable of inheriting. *McDonald v. Walton*, ii. 48.

c. CLAIMS AGAINST ADMINISTRATOR.

110. No lapse of time is a bar to a direct trust, as between a trustee and the *cestui que trust*, and an administrator being a trustee cannot avail himself of the statute in bar of a claim in favor of the next of kin, or persons entitled as distributees of an estate. *Rubey v. Barnett*, xii. 3.

d. PLEADING.

111. A plea alleging that suit was not brought within three years after the granting of letters of administration is bad. It should allege that the cause of

action had accrued more than three years before suit was brought. *Finney v. The State* ix, 225.

112. As to pleas of an executor or administrator under the statute of limitations, in relation to demands against estates. *Wiggins v. Lovering*, ix, 259.

See LIMITATIONS, 11, 12, 24, 25.

XII. DISTRIBUTION.

113. Where there is a primary and ancillary administration, and the tribunal having jurisdiction of the ancillary administration can distribute or remit the assets, the courts having jurisdiction of the primary administration will not interfere within the limits of the ancillary administrator. *The State v. Campbell*, x, 724.

114. Upon an order of the County Court, an administration may be compelled to make distribution at any time after one year from the date of his letters, without a refunding bond. *The State v. Stephenson*, xii, 178.

115. But an order of distribution by the County Court is not a necessary prerequisite to the maintenance of a suit by an heir for her distributive share of the intestate's estate. *The State v. Morton*, xviii, 53.

116. Where adult children have been reared and educated by their father during his lifetime, the minors should be educated and supported out of his estate after his death. *The State v. Stephenson*, xii, 178.

117. Where older children have been educated and supported out of his estate, and distribution is made before the younger ones derive any such benefit, the excess received by the older should, in making distribution, be charged against them in favor of the younger. *Ibid.*

118. The personal estate of an intestate does not, upon his death, descend immediately to those entitled to distribution, but where there is an administration on the estate, the right to the possession is in the administrator. *Gillet v. Camp*, xix, 404.

119. A legatee, suing an administrator on his bond, is not entitled, as a matter of course, to be satisfied out of the damages recovered, to the exclusion of the other legatees or of creditors. *The State v. Ruggles*, xx, 99.

120. A judgment rendered, requiring the administrator to pay over to the distributees a certain sum of money as assets of the estate, is conclusive on the securities of the administrator in a suit on his bond, except where fraud and collusion are shown. *The State v. Holt*, xxvii, 340.

See CHANCERY, 148; ... INTEREST, 15-17; ... JURISDICTION, 12; ... SUPRA, 33.

XIII. SALE.

a. RIGHT OF ADMINISTRATOR TO PURCHASE AT.

121. At an executor's sale, in Spanish times, no bidder presenting himself for a common field lot which was subject to a charge for keeping the com-

mon fence in repair, the same was by the Lieutenant Governor transferred to the executor, upon his assuming to bear the charge—*Held*, that the transfer was to be regarded as a governmental act, made upon considerations affecting the public, as well as from a regard to the interests of the estate, and did not come within the rule that an executor could not purchase property which it was his duty to administer. *Charleville v. Chouteau*, xviii. 492.

b. SALE OF PERSONALTY.

122. By the act of January 25, 1817, (1 Ter. L. 509, § 1,) the personal estate of the deceased constituted the primary fund for the payment of his debts, and should be so applied to the exclusion of the widow. *Stokes v. O'Fallon*, ii. 32.

123. The mere failure by an administrator to give the required notice of a sale of personal property will not, of necessity, invalidate the title of the purchaser. *James v. Dixon*, xxi. 538.

124. The sale bill kept at an administrator's sale is, (when returned and properly sworn to,) *prima facie* but not conclusive evidence as to who was the purchaser of any given article. *Talbot v. Mearns*, xxi. 427.

c. SALE OF SLAVES.

125. Facts which show fraud in administrator's sale of slaves. *Keeton v. Keeton*, xx. 530.

126. A sale by an administrator, under an order of the County Court, of an equity of redemption in a slave is valid, although the slave is in the possession of the mortgagee, who claims to hold absolutely, and refuses to deliver up the possession. *Phillips v. Hunter*, xxii. 485.

d. SALE OF REALTY.

aa. *Proceedings to obtain an Order.*

127. Upon a petition by an administrator to have the land of an estate sold for payment of debts, a party interested in the land may resist the application, and show that the judgments were obtained by fraud and collusion. *Callahan v. Griswold*, ix. 775.

128. The proceedings of an administrator to obtain an order from the county court to sell real estate, are not proceedings *in rem*. And the provision in the statute which requires notice to be given to persons interested in the estate, (R. S. 1845, 86, § 24,) does not include those who may claim the estate to be sold by superior title, but such only as are interested in the general administration, the creditors and heirs. *Shields v. Ashley*, xvi. 471.

129. And in such case, the person claiming the real estate by a paramount title, has no right to interfere with the proceedings. *Ibid*.

130. In a proceeding for the sale of a decedent's land, it is not necessary that guardians *ad litem* should be appointed for minor heirs. *Overton v. Johnson* xvii. 442.

131. A purchaser at an administrator's sale is not bound to maintain the truth of the facts on which an order of sale of the real estate was based. *Wolf v. Robinson*, xx. 459.

132. A petition to the Probate Court for a sale of land for the payment of debts, should not be dismissed for want of an averment that the lands mentioned in the petition belonged to the intestate at the time of his death. *Trent v. Trent*, xxiv. 307.

See FRAUD, 25; . . . JURISDICTION, 33-36.

bb. *Notice of Sale.*

133. A want of sufficient notice of a sale by an administrator renders the sale voidable only, and not void; and such sale cannot be attacked collaterally. *McNair v. Hunt*, v. 300.

134. And under the Spanish law, in this territory, such sale could not be attacked after four years. *Ibid.*

135. An administration sale of land is void if the record shows, that the notice which the law requires to precede the order of sale could not have been given. (R. S. 1835, 52, § 12.) *Valle v. Fleming*, xix. 454.

136. And is not valid until reported to and confirmed by the court, and the approval should be shown by the record. (R. S. 1835, 53, § 21.) *Ibid.*

cc. *Conditions and Requisites.*

137. Where land has been sold for the payment of debts, the legal presumption is that the personalty has been exhausted, although the fact does not appear of record. *McNair v. Hunt*, v. 300.

138. Under the Spanish law of the territory, an appraisement was not necessary to the validity of an administrator's sale of land. *Ibid.*

139. Sales of real estate of deceased persons, made for the payment of debts, must conform to the requisitions of the statute, (R. S. 1835, 52, §§ 8-23,) and no power is conferred on the County Court to order a sale by the sheriff. *Jarvis v. Russick*, xii. 63.

140. One of the administrators having died, new letters were granted to the survivor and another, there being no express revocation of the old letters—*Held*, that a sale by the last was valid. *Valle v. Fleming*, xix. 454.

141. A void administration sale is not rendered valid as against minor heirs by the fact that the proceeds thereof had been ordered to be accounted for to them. *Ibid.*

142. An administration sale under the act of 1807, (1. Ter. L. 138, § 56,) is not void because the affidavit of the administrator that he was not the purchaser was not made within the time required by law; nor is it necessary to produce the advertisement to sustain it. *Vasquez v. Richardson*, xix. 96.

143. The circumstance of a sale by the purchaser to the administrator, subsequent to the administrator's sale, will not warrant a presumption of fraud. *Ibid.*

144. An administration sale of land appearing upon the record to have been made under that section of the statute which provides for the payment of the debts, (R. S. 1835, 52, § 8,) and void for want of the notice required by that

section, cannot be sustained as having been made under other sections, which provide for a sale for other ends, and which require no notice. (*Ibid* 51, §§ 2-3.) *Valle v. Fleming*, xix. 454.

145. Where a sale for the payment of debts is approved by the Probate Court at the same term during which the sale takes place, the heir, not having notice of such approval, so that he is deprived of his appeal, may call in question such approval in a suit brought against him by the purchaser for a divestiture of title. *Speck v. Wohlien*, xxii. 310.

146. Where an administrator had agreed to convey certain real estate of his intestate for a certain consideration, it was held that the sale not being for the purpose of paying debts, though with the consent of the Probate Court, he could not sell the interest of minor heirs in such estate, under such circumstances, and that the conveyance of all the estate, except their interest, was not a fulfillment of the agreement to convey. *Bompart v. Lucas*, xxi. 598.

147. An administrator has the power, with the consent of the Probate Court, to sell the real estate of his intestate for the payment of debts, but has no power to sell the interest which the intestate had in real estate, simply for the sake of effecting a compromise of a disputed claim. *Ibid*.

148. A sale of real estate for the purpose merely of paying the costs of administration, is invalid, though approved by the Probate Court. *Farrar v. Dean*, xxiv. 16.

149. The act of 1807 (1 Ter. L. 138, § 56,) authorized the sale under the order of the general court, of an intestate's estate, for the payment of his debts, although he left no lawful issue. The administrator was authorized, in case of sale, to make a deed to the purchaser, and after the lapse of fifty years from the date of such sale, proof of the advertisement and other pre-requisites of such sale will not be required. *Blair v. Marks*, xxvii. 579.

dd. *Setting Aside.*

150. Where an administrator's sale of real estate is absolutely void, the remedy for the creditors is, to proceed in the Probate Court for a re-sale, and for the heirs to sue for the possession. *Bank of Mo. v. White*, xxiii. 342.

151. Where a creditor of an estate seeks to set aside a sale and conveyance made by an administrator, on the ground of fraud, the administrator not being a party, and it not appearing but that there are other creditors, a decree directing the payment of such creditor out of the proceeds of a resale, is erroneous. *Ibid*.

ee. *Deed.*

152. An administration sale passes no title, unless a deed is executed. *Wohlien v. Speck*, xviii. 561.

See CHANCERY, 10.

ff. *Purchase of equitable Interest and Rights acquired thereby,*

153. The heirs of an intestate cannot, by obtaining a decree vesting in them the legal estate of which he died seized in equity, defeat nor affect the right of the administrator to sell the intestate's equity in the land for the payment of the

debts due by him; and the purchaser, at an administrator's sale, may have the legal estate conveyed to him. *Wolf v. Robinson*, xx. 459.

See DOWER, 34.

XIV. SETTLEMENT.

154. Permission from the court to an administrator "to retain in his possession the money of minors, paying lawful interest therefor," does not annul the obligation to make annual and final settlements, or impair the authority of the security to compel him to do so after the expiration of the time for which the money was loaned. *Devore v. Pitman*, iii. 179.

155. An administrator having given legal notice and made a final settlement of the estate, had an allowance in his favor of \$190 42, and resigned his administration. At the same term at which the settlement was made, but without notice to the administrator, the court set aside the allowance, and upon a new settlement found a balance of \$101 against him—*Held*, that after settlement and resignation of his office, the administrator was no longer in court; that the County Court had power, during the term, to vacate an order made at that term, but not without notice to the administrator; and that the last allowance was therefore void. *Caldwell v. Lockridge*, ix. 358.

156. A settlement made by an administrator has the force of a judgment, and a balance on such settlement may be found in his favor without his having made oath or affidavit as required in case of a demand presented against an estate. *Ibid*.

157. Where an administrator made a final settlement, and the court ordered the money in his hands to be distributed, no demand need be made by the distributees to make the administrator liable to an action. *Henry v. The State*, ix. 769.

158. And where one of the distributees was a minor, and had a guardian, it was the duty of the administrator to pay the money to the guardian. *Ibid*.

159. Where an administrator makes a final settlement, the power of the court over his accounts ceases. *The State v. Stephenson*, xii. 178.

160. Notes of an estate executed to the administrator, which cannot be collected, and which are lost without his fault or negligence, should be credited to him with the accrued interest thereon, when he has been charged with the interest. *Stong v. Wilkson*, xiv. 116.

161. An administrator is chargeable with interest on uncollected notes at the rate of interest they bear, as well as upon money in his hands, and he should be credited by interest upon payments made by him. *Ibid*.

162. Whether an administrator shall be charged with interest on money in his hands belonging to the estate, is to be determined by the circumstances of each case; he is not to be so charged as a matter of course. *Madden v. Madden*, xxvii. 544.

163. A settlement made with the County Court by an administrator, which is fraudulent in law, may be set aside by a court of chancery. *Stong v. Wilkson*, xiv. 116.

164. The allowances made to administrators, in their settlements, have the effect of judgments; but they may be set aside in equity, on cause being shown. *Jones v. Brinker*, xx. 87. *Whittelsey v. Dorsett*, xxiii. 236.

165. And it is not sufficient to allege that the administrator illegally procured allowances to be made in his favor; fraud must be alleged. *Ibid. Ibid.*

XV. COMPENSATION OF REPRESENTATIVE.

166. Where the County Court allows a gross sum to joint administrators, for their compensation, they are entitled to equal portions, without regard to the extent of services rendered by them respectively. *Smart v. Fisher*, vii. 580.

167. An administrator is not entitled to commission upon the assessed value of the slaves of the estate. He is entitled to a reasonable compensation for hiring them, &c. *Stong v. Wilkson*, xiv. 116.

168. The common law doctrine of retainer, in favor of executors and administrators, is abolished by our statute. *Nelson v. Russell*, xv. 356.

XVI. PARTNERSHIP.

169. A note given by a surviving partner to the administrator of a deceased partner, who had administered upon the effects of the partnership, is valid, although such settlement may not have been in accordance with the statute. (See R. S. 1845, 70, §§ 51-56.) *Buckham v. Singleton*, x. 405.

170. Where a slave, the property of a partnership, is sold under an execution against one of them for his individual debt, his administrator is not entitled to the slave, on the ground that the partnership is insolvent. *Darby v. Swartz*, xi. 217.

171. Where partners purchased a leasehold estate with partnership funds, gave a deed of trust upon it, and the trustee, after the death of one of the partners, sold the estate under the power in the deed, a surplus remaining—*Held*, that the surplus was to be considered as partnership property, upon which the surviving partner was entitled to administer. *Carlisle v. Mulhern*, xix. 56.

172. The administrator of a deceased partner gave notice to the surviving partner that unless he should give bond as required by statute, he would move the County Court for an order directing him, the administrator, to take charge of and administer the property of the firm—*Held*, that this was a good citation under the statute. (R. S. 1845, 71, § 53.) *James v. Dixon*, xxi. 538.

173. Where a surviving partner gives the bond required by statute, (R. S. 1845, 70, §§ 50, 51,) with approved securities, he cannot be removed and deprived of his right to the control and management of the partnership effects, on the ground that he has, since the giving of the bond, become a non-resident. *Green v. Virden*, xxii. 506.

174. A settlement made in court by a surviving partner who has given bond under the statute, (R. S. 1845, 70, §§ 50, 51,) does not release him from liability

on his bond for a debt due to the estate of the deceased partner, for money advanced by him to the firm, which debt was not included in the settlement. *The State v. Baldwin*, xxvii. 103.

XVII. DEVASTAVIT.

175. Administrators can sell or distribute the personal estate of their intestate, so as to pass a good title to purchasers or distributees. If they misapply assets over which they have an absolute power of alienation, they commit a *devastavit* for which they and their securities are liable. *Overfield v. Bullitt*, i. 749.

176. The application of the assets of an insolvent estate, by an administratrix, to the improvement of the real estate of the deceased, is waste. But the consequent increase in value of such real estate may be shown in mitigation of damages, under an agreement to let in any equitable defense. *TOMPKINS, J., dis. Byrd v. Governor*, ii. 102.

See CHANCERY, 54, 134; . . . JURISDICTION, 81; . . . SUPRA, 42.

XVIII. EXECUTOR DE SON TORT.

177. S. died in Tennessee, in possession of property in that State, which the defendants afterwards took and removed to Missouri—*Held*, that they were chargeable as executors *de son tort*, in this State, without proof of the laws of Tennessee. *Foster v. Nowlin*, iv. 18.

178. A party may be charged as executor *de son tort*, although there is a rightful executor. *Ibid*.

179. H. died in 1831, leaving a widow and nine children. At the time of his death he owed debts to about the amount of seventy dollars, and the property left by him did not exceed that sum in value. The widow took possession of the property and paid the debts. In 1838 the widow intermarried with one B. Shortly after the marriage one of the sons of H. took out letters of administration on his father's estate, went to the house of B. and forcibly took possession of the property in controversy, as the increase of the stock left by H. B. sued the defendants in trespass, and recovered the value of the property taken. Under the peculiar circumstances of the case, the court permitted the verdict to stand. *Crastin v. Baker*, viii. 437.

180. A. and B., both citizens of Missouri, were digging gold and living in a tent together, in a wild, unsettled region of California. A. died, leaving a sum of gold and some wearing apparel. After his death, B. sold the wearing apparel, caused the gold to be weighed, and a memorandum of it to be made by some of A.'s acquaintances, residents of the same county in Missouri, and took out of it enough to pay the expenses of his sickness and interment, and started with the remainder for Missouri. On his way, his trunk was broken open, and the gold belonging to A. stolen—*Held*, that these acts, considering the state of affairs in California at that time, did not render B. liable to A.'s adminis-

trator in Missouri as an executor *de son tort*, being acts of kindness and charity; and that in undertaking to bring the gold home, B. only incurred the liability of a bailee without hire, and was responsible only for gross negligence. *Graves v. Poage*, xvii. 91.

181. The defendant, at the request of the widow of the deceased, sold certain effects, and with the proceeds paid the funeral expenses, and then paid to the widow the surplus—*Held*, that by so doing he did not render himself executor *de son tort*. *Magner v. Ryan*, xix. 196.

182. The previous acts of an executor *de son tort*, are legalized by his taking out letters of administration. *Ibid*.

XIX. ADMINISTRATOR DE BONIS NON.

183. Where an administrator dies in possession of specific property which can be identified as belonging to the estate upon which he administered, the administrator *de bonis non*, is entitled to the possession of it; but it is otherwise when the property cannot be identified. *Gamble v. Hamilton*, vii. 469.

184. Secs. 34 and 35, Art. I, of the statute relating to administration (R. S. 1835, 44,) construed. *The State v. Porter*, ix. 352.

185. Where the cause of action is such that the original administrator might have sued in his representative character, the right of action devolves upon the administrator *de bonis non*, of the intestate, and not upon the representative of the original administrator. *Harney v. Dutcher*, xv. 89.

186. Where the property in any of the effects of the deceased has been changed by the original administrator so as to vest the property in him in his individual capacity, such effects will go to his own representatives, and not to the administrator *de bonis non*, of his intestate. *Ibid*.

187. The principle of the common law which entitled an administrator *de bonis non* to those goods only which remained in specie, and not administered on by the first administrator, is abolished by the system of administration in this State. *The State v. Hunter*, xv. 490.

188. An administrator *de bonis non* is not liable for a failure to collect judgments recovered by a previous administrator, and which were assets belonging to the estate, where it does not appear that he had notice of their existence. *The State v. Ruggles*, xxiii. 339.

See EVIDENCE, 158.

XX. PUBLIC ADMINISTRATOR.

189. The County Court may order the public administrator to take possession of an estate in any case in which no administration has been taken out under the general law. *Callahan v. Griswold*, ix. 775.

190. The certificate of a Judge of Probate that A. B. is public administrator,

is not competent evidence of that fact. He can only certify to the correctness of the copies of the record, showing the appointment of such officer. *Littleton v. Christy*, xi. 390.

XXI. WIDOWS AND THEIR RIGHTS.

191. The 29th and 30th sections of the administration act of 1845, making allowances to widows, (R. S. 1845, 77,) do not apply to a woman who has been divorced from her husband. *Dobson v. Butler*, xvii. 87.

192. The right of a widow to two hundred dollars' worth of property, under the statute, (R. S. 1845, 77, §§ 30-32,) vests immediately upon the death of her husband. And where personal property is sold for money, and the widow dies without receiving her portion of \$200, it must be paid to her administrator, though there may be debts of the husband remaining unpaid. In such case, it is not proper to distribute her share, except through her administrator. *Hastings v. Myers*, xxi. 519.

XXII. INSOLVENTS' ESTATES.

193. The plaintiffs, who were heirs of A., joined other parties in a suit for partition; an order of sale was made, but before the sheriff made his report, the defendant, who was the administrator of A., applied to the court for an order that the proceeds of the sale going to the heirs should be paid over to him for the benefit of A.'s creditors—*Held*, it appearing that the estate was insolvent, that such order was properly made. *Langham v. Darby*, xiii. 553.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 29 ; . . . COSTS, 23 ; . . .
ERROR, 2 ; . . . EVIDENCE, 92 ; . . . EXECUTION, 13 ; . . . JUDGMENT, 40 ;
JURISDICTION, 12 ; . . . WITNESS, 54.

AGENCY.

- I. EVIDENCE OF.
- II. AGENT'S AUTHORITY.
- III. PRINCIPAL'S LIABILITY FOR AGENT'S ACTS.
- IV. PRINCIPAL'S LIABILITY TO AGENT.
- V. AGENT'S LIABILITY TO THIRD PERSONS.
- VI. AGENT'S LIABILITY TO PRINCIPAL.
- VII. PARTIES TO ACTION.
- VIII. REVOCATION OF AGENCY BY DEATH OF PRINCIPAL.

IX. FACTOR.

- a. ADVANCES.
- b. MUST OBEY INSTRUCTIONS.
- c. RIGHTS AND LIABILITY.
- d. FACTOR'S LIEN.
- e. RIGHTS OF CONSIGNOR.

I. EVIDENCE OF.

1. Where a note is signed thus—"A. B., by his attorney in fact, C. D."—and it appears that C. D. had an authority in writing to execute said note—*Held*, in an action on the note against A. B., that the instrument conferring the authority must be produced, or its absence accounted for. Where its absence is not accounted for, the testimony of C. D., to the effect that he had such an authority in writing, is not admissible. *Bank of Missouri v. Scott*, i. 744.

2. To make a letter to an agent evidence, the fact of the agency must first be established. *TOMPKINS, J., dis. Brown v. Bank of Missouri*, ii. 191.

3. Where, in an action on a note executed by an agent, non-assumpsit is pleaded, the authority of the agent must be proved. *Swearingen v. Knox*, x. 31.

4. If a bill of exchange purports to have been drawn under a special written authority referred to, other evidence may be gone into to establish the agent's authority, so as to relieve him from personal liability on the bill, as a person acting for another without authority. *SCOTT, J., dis. Page v. Lathrop*, xx. 589.

See *INFRA*, 7.

II. AGENT'S AUTHORITY.

5. A letter of attorney, in the following form, to wit:—"Know all men whom it may concern, that I, A. B., do nominate and appoint C. D. as my true and lawful attorney, to act in all my business in all concerns, as if I were present myself, and to stand good in law in all my land and other business in the Missouri Territory: This I acknowledge to be my full power invested in him, as witness my hand and seal this day and date, etc. (Signed) A. B. [SEAL.]"—does not confer a power to make a valid sale of lands, or to make binding covenants in relation thereto. *Ashley v. Bird*, i. 640.

6. McK. executed, on the same day, to his brother, two letters of attorney; in the first was granted the power to make and endorse notes and bills of exchange; in the second, the power to sell and convey absolutely, or to demise and lease certain described premises—*Held*, that the two powers should be construed together, and that they gave the attorney authority to mortgage the premises. *TOMPKINS, J., dis. Bank of Missouri v. McKnight*, ii. 42.

7. An authority to an agent to purchase property on credit, implies an authority to acknowledge the indebtedness in the name of his principal. And the fact that the principal had in other instances recognized the authority of the

agent to sign notes in his name by paying them without objection, is admissible in evidence to show authority in the particular instance on trial. *Stothard v. Aull*, vii. 318.

8. An agent with full authority to transact business, to employ men, purchase logs, sell lumber, and to perform any other business connected with his principal, has "a general authority in a particular business," and may transfer lumber in payment of wages due to men employed by him. *Taylor v. Labeaume*, xiv. 572. See *INFRA*, 11.

9. An authority to sell and convey lands for cash confers on the attorney the right to receive the purchase money. *Johnson v. McGruder*, xv. 365.

10. An authority to sell a slave includes and implies a power to warrant his soundness. *Dennis v. Ashley*, xv. 453.

11. A general agent, having the entire superintendence and management of the business of a lumber company, the members of which live abroad, has authority, in good faith, to make a transfer of lumber in trust to pay off the hands in the employ of the company. The creditors of the company cannot avoid such a transfer on the ground that the members of the company had previously agreed with a third person to deliver all the lumber to him to be disposed of for the company; certainly not, where such third person recognizes the right of him to whom the transfer is made, and does not insist that he has any right or claim. *Taylor v. Labeaume*, xvii. 338.

12. Where the owner of land sends a real estate broker into market to dispose of it without any directions as to the title, he thereby gives assurance to the world that his title is valid. *Kent v. Allen*, xxiv. 98.

13. An engineer of a plank road company, who has power, under the contract for the construction of the road, to control the contractor, and whose duty it is, after the road is completed, to make an estimate of all the work done, has no power, if the road has not been built according to contract, to bind the company to adjust the matter in any particular mode. *Barcus v. Hannibal Plank R. Co.*, xxvi. 102.

See *CONVEYANCES*, 11; . . . *COUNTY*, 11; . . . *PRACTICE*, 142.

III. PRINCIPAL'S LIABILITY FOR AGENT'S ACTS.

14. The principal is not bound by the act of a special agent or attorney, unless the terms of such agency have been pursued, nor unless the power of attorney will warrant the act done under it. *Wahrendorff v. Whitaker*, i. 205. *Tate v. Evans*, vii. 419.

15. The principal is bound by the action of the agent in matters left to the agent's judgment and discretion, although he act erroneously. *Per M'GIRK, J. Ruggles v. Washington County*, iii. 496.

16. Where a party's name is inserted in the body of an agreement as the contracting party, and is signed at the proper place by his agent, thus, "S., by his agents, C. and V." he alone is liable upon the contract, and the agent cannot be held. *Thompson v. Chouteau*, xii. 488.

17. The defendant employed an agent to sell a stock of goods, and to facilitate the sale, the agent purchased from the plaintiffs and others, additional goods, in his own name. The defendant knew of these purchases—*Held*, that the principal was liable therefor. *Little v. Stettheimer*, xiii. 572. *Little v. Sell*, xiii. 577.

18. One who places another in a position in relation to his property calculated to deceive those dealing with such apparent agent, is bound by his acts in that relation. *DeBaun v. Atchison*, xiv. 543.

19. The rule that the acts of an agent after the death of his principal are void, only applies to acts which must be done in the name of the principal, and not to those which the agent may do in his own name. Thus, the executor of A. cannot recover from B. money received by the latter in discharge of notes given by C., the agent of A., to secure advances made by B. to C., as such agent, A.'s, death having taken place unknown to both parties, before the advances were made. *Dick v. Page*, xvii. 234.

20. Acts of an agent done after the revocation of his agency, bind both his principal and himself, so far as they regard third persons, who are ignorant of the revocation. *Lamothe v. St. Louis Mar. Railway and Dock Co.*, xvii. 204.

21. Where an agent disobeys the instructions of his principal, the latter, in a suit between them, will not be held to have ratified the acts to which he has failed to signify his dissent. *Lewin v. Dille*, xvii. 64.

22. If an agent borrow money for his principal, and procure another to become surety, without disclosing his relation as agent, the principal is answerable to the surety who pays the debt. *Higgins v. Dellinger*, xxii. 397.

See CHANCERY, 110;....COUNTY, 10;....DRAMSHOPS, 35, 36;....HUSBAND AND WIFE, VII.

IV. PRINCIPAL'S LIABILITY TO AGENT.

23. Where B. sells land to R., under a void letter of attorney, and receives and pays over the purchase money to his principal, and is afterwards sued by R., and judgment is recovered against him for the amount of the purchase money, B. will be left to his remedy against his principal, to whom he had paid the money. *Ashley v. Bird*, ii. 107.

See SET-OFF, 34.

V. AGENT'S LIABILITY TO THIRD PERSONS.

24. An agreement purporting to be made by a party and signed by him, is his agreement, although he styles himself the agent of another. *Chouteau v. Paul*, iii. 260.

25. If an agent draws a bill in his own name, he is individually liable upon it, although his agency was known to the other party at the time, and that he was acting in that capacity. *Smyth v. Spalding*, xiii. 529.

26. A person signing a note as attorney, without authority, is personally lia-

ble, if it contain apt words to bind him personally. *Byars v. Doorea*, xx. 284.

27. Thus a due bill signed "A., agent for B.," will bind A., if he had no authority to bind B. *Coffman v. Harrison*, xxiv. 524.

28. *Quere.*—Can a payee, who receives a bill drawn by an agent in the name of his principal, under a written authority shown to him at the time, afterwards charge the agent as principal, as having drawn without authority? *Page v. Lathrop*, xx. 589.

29. Where an agent enters into a contract in his own name, without disclosing the name of his principal, he is personally liable. *McClellan v. Parker*, xxvii. 162.

See CHANCERY, 110;...COUNTY, 7-9;...DRAMSHOPS, 35, 36....PRACTICE, 141.

VI. AGENT'S LIABILITY TO PRINCIPAL.

30. An agent is responsible to his principal for the loss occasioned by his violation of his duties either by exceeding or disregarding instructions, and it is no defense that he intended to act for the benefit of his principal. *Switzer v. Connett*, xi. 88.

31. An agent is bound to execute the orders of his principal which are legal and moral, whenever, for a valuable consideration, he has undertaken to perform them, unless prevented by some unavoidable accident, without any default on his part. *Ibid.*

32. A. constituted B. his agent to sell a pre-emption claim, and he sold it, and received the purchase money. The sale was made after the death of A., but in ignorance thereof, and in good faith; but the purchase money was paid after knowledge, by both the agent and the purchaser, of the death of A.—*Held*, that A.'s representatives were entitled to recover of the agent the purchase money so received. *Carriger v. Whittington*, xxvi. 311.

33. Where a principal seeks to recover specific sums of money alleged to have been received and misappropriated by his agent, it is not error to refuse to order an account to be taken, as prayed for by the plaintiff. *Matthews v. Wilson*, xxvii. 155.

34. One who ratifies an act done in his name, but without his authority, ratifies it as done; he cannot make such an agent responsible for not doing the act in the manner he would have been bound to perform it if he had been an authorized agent. *Menkens v. Watson*, xxvii. 163.

See DEMAND, 2, 3;...INTEREST, 11.

VII. PARTIES TO ACTION.

35. An agent cannot maintain an action in his own name when the legal interest in the subject matter of the suit is in his principal. *JONES, J., dis White v. Bennett*, i. 102. *Devers v. Becknell*, i. 333.

36. An attorney in fact, with authority to sue for and recover a debt, "one half of which was to be to the proper use of him, said attorney," cannot recover of the sheriff the proceeds in his hands of an execution issued on a judgment obtained by the attorney in the name of his principal. *Butler v. Johnson*, ii. 7.

37. An agent who sells goods of which he is in possession, as his own property, may recover the price in his own name. *Coggburn v. Simpson*, xxii. 351.

38. Where a party is in possession of a store as a clerk or agent of another, his possession is that of his principal. *Ibid.*

VIII. REVOCATION OF AGENCY BY DEATH OF PRINCIPAL.

See SUPRA, 19, 20.

IX. FACTOR.

a. ADVANCES.

39. Where a factor advances on consigned goods, and realizes the amount of such advances by bills drawn by him against the goods, he cannot recover for such advances without first showing that such bills were dishonored, and that he has paid or is liable thereon. *Sigerson v. Pomeroy*, xiii. 620.

40. Where a factor receives merchandise for shipment to a particular consignee, and makes advances thereon, and the merchandise is refused by the consignee by reason of its being in a damaged condition, and is then sold for less than the advances, the consignor is liable for the balance of the advances. *Bull v. Sigerson*, xxiv. 53.

b. MUST OBEY INSTRUCTIONS.

41. A factor is bound to follow the instructions of his principal, and if he deviates from them he does it at his own risk—whether he has or not is a question for the jury. *Sigerson v. Pomeroy*, xiii. 620. See INFRA, 43.

c. RIGHTS AND LIABILITY.

42. A count, charging a factor with not selling for the best price, is not sustained by evidence of a delay in selling, the price obtained being the best to be had at the time of sale. The delay in selling should be alleged as the ground of recovery. *Merle v. Hascall*, x. 406.

43. Where goods are consigned to a factor to be sold at a fixed price, and he disposes of them at a less rate, he is responsible to his principal for the price fixed on them, and is to be regarded as a purchaser, and not as a mere stranger guilty of a tortious conversion. *Switzer v. Connett*, xi. 88.

44. A factor may pay over to his principal the proceeds of goods consigned to

him for sale, although he may know that his principal had promised to pay certain of his creditors out of such proceeds. *Pearce v. Roberts*, xxvii. 179.

See SUPRA, 39, 40.

d. FACTOR'S LIEN.

45. Although a factor who has a lien upon the goods of his principal for advances made, may sell to reimburse his charges, yet it must be done strictly in the usual mode of business. *Benny v. Rhodes*, xviii. 147.

46. A factor's lien covers any general balance due him on his account as factor; and where goods are consigned to him for a special purpose, the question whether he has or has not a lien, depends upon the fact whether he did or did not receive notice of this special purpose. *Archer v. McMechan*, xxi. 43.

See SALE, 25.

e. RIGHTS OF CONSIGNOR.

47. The title of a principal to his goods is not divested by his factor's transfer of them to pay a private debt. *Benny v. Rhodes*, xviii. 147.

48. Where a factor delivers goods of his principal in payment of his own debt, the principal may recover them, notwithstanding he is indebted to the factor to an amount as great as the value of the goods. *Benny v. Pegram*, xviii. 191.

See EVIDENCE, 100-105; . . . INSURANCE, 52; . . . WITNESS, 55, 56.

ALIENS.

1. Aliens may take as distributees of personal property, (in this case, slaves.) *Greenia v. Greenia*, xiv. 526.

2. An alien, residing in a foreign country, cannot take real estate by descent in this State. (R. S. 1845, 113.) *Wacker v. Wacker*, xxvi. 426.

3. A foreign sovereign may maintain an action in the courts of this State against one of its citizens. *King of Prussia v. Kuepper*, xxii. 550.

4. Thus, where by a law of Prussia, the King, upon refunding to the proper owners, under a law of the kingdom, money stolen or embezzled by an officer of the Post Office department, while the same were passing through that department, became subrogated to the rights of said owners against the embezzling officer, such embezzling officer having absconded from Prussia and come to this State, it was *held*, that the King might maintain an action against him in this State. *Ibid*.

See DOWER, 1.

AMENDMENT.

- I. GENERAL RULES.
- II. WRIT AND RETURNS.
- III. PLEADINGS.
- IV. JUDGMENTS.
- V. RECORDS.

I. GENERAL RULES.

1. Amendments are not allowed as a matter of course, but are only permitted at the discretion of the court, in furtherance of justice. *Caldwell v. McKee*, viii. 334.

2. And it is for the court below to determine the manner in which they shall be made. *Riggin v. Collier*, vi. 568.

3. The statute authorizing amendments to pleadings, (R. S. 1845, 826,) does not admit new plaintiffs to be introduced. *Chouteau v. Hewitt*, x. 131.

4. To an action of debt on a judgment, the defendant pleaded *nul teil* record, and on the day of trial asked leave to file a plea of *nil debet*—*Held*, that it was a sound exercise of discretion to refuse it. *Pinkston v. Stone*, iii. 119.

5. A court has power to order entries of proceedings, had by the court at a previous term, to be made *nunc pro tunc*. But where the court has omitted to make an order which it might or ought to have made, it cannot, at a subsequent term, be thus made. In all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry. *Hyde v. Curling*, x. 359.

6. No question can exist as to the power of a court to make *nunc pro tunc* entries on the record for the furtherance of justice. *The State v. Clark*, xviii. 432.

7. Amendments should be allowed liberally in furtherance of justice. *Chauvin v. Lownes*, xxiii. 223. *Martin v. Martin*, xxvii. 227.

II. WRIT AND RETURNS.

8. In petition in debt, the sheriff returned that he read the summons to the defendant, but did not state that he read or left a copy of the petition—*Held*, that after judgment by default, the return might be amended either in the Circuit or Supreme Court, under the statute (R. S. 1835, p. 468, §§ 7, 8.) *Muldrow v. Bates*, v. 214.

9. It is error to allow an amendment to be made to an officer's return, except on terms not prejudicial to the rights of parties. *See v. Bobst*, ix. 28.

10. Where a writ was directed to the coroner and served by him, pending motions by the defendants to quash the writ and return, the plaintiff may amend by stating the reason why it issued to the coroner. *Moss v. Thompson*, xvii. 405.

11. A motion may be made to amend a return to a writ after a motion made to set aside the judgment. *Blaisdell v. St. Bt. Wm. Pope*, xix. 157. [OVER-RULING *Maulsby v. Farr*, iii. 438.]

12. And the fact that the officer, who executed the writ, is no longer the officer of the court when leave is given to amend the return, is no objection. *Ibid.* *Miles v. Davis*, xix. 408.

III. PLEADINGS.

13. Leave to amend pleadings may be given, after demurrer to them sustained. *Davis v. Burns*, i. 264.

14. A plaintiff may, at the return term of a writ, amend his surname in the declaration, and then take judgment by default. *Boisse v. Langham*, i. 572.

15. An amended declaration is, in contemplation of law, an entire new declaration, and should be so in fact, unless the parties consent to a different manner of making the amendment. Therefore, where leave was given plaintiff to amend his surname in the declaration, and the only use which was made of the leave was an endorsement on the declaration, in these words "Amended, by substituting the name of *Boisse* for *Bizet*, wherever it occurs," it was held to be no amendment. *Ibid.*

16. Where the breach as assigned is too large, the declaration may be amended. *Sharp v. Colgan*, iv. 29.

17. The bond sued on, in an action of covenant, was set out by its tenor, and the words "of October" were omitted in stating the date for the payment of an instalment. On trial the plaintiff moved for leave to amend the declaration by supplying the omitted words, which motion was refused—*Held*, that there was a material variance between the declaration and the instrument offered in evidence under it, and that the Supreme Court would not reverse the judgment of the court below in disallowing the amendment. (See R. S. 1835, 467.) *Long v. Overton*, vii. 567.

18. Where a judgment by default is rendered on a defective declaration, it is competent for the court to amend the declaration after judgment, but such amendment should not be permitted without giving the defendant leave, on application, to plead. *Neidenberger v. Campbell*, xi. 359.

19. Where, on such a declaration in ejectment, judgment by default has been rendered against the defendant, and the tenant and landlord had no notice of the suit, an amendment should not be permitted without giving the landlord leave to plead. *Ibid.*

20. Leave to amend may well be refused where the party refuses to state in what particular he wishes to amend. *Taylor v. Blair*, xiv. 437.

21. By the practice act of 1849, amendments are allowed even at the trial, (Acts 1848-9, 87, Art. XI,) in order to conform the petition to the proof, and avoid a nonsuit on account of a variance, but the cause of action cannot be changed thereby. *Butcher v. Death*, xv. 271.

22. But it is not allowable during the trial of a cause, for the defendant to amend his answer by stating a set-off to the note sued on. *Powers v. Nelson*, xix. 190.

23. The plaintiff after swearing to his petition, amended the caption on leave, and did not swear to it again—*Held*, that this was no reason for reversing the judgment. *Matthews v. Rountree*, xx. 282. *Murdoch v. Finney*, xxi. 138.

24. Where the inferior court allowed the plaintiff to amend his petition, changing the form of action from that of assumpsit to trover, the effect of which change was to cut off a set-off pleaded by the defendant, the Supreme Court will not interfere. *Lee v. Lee*, xxi. 531.

25. Where an answer is stricken out for insufficiency, and the defendant prays the court to grant him time in which to file an amended answer, the court is not bound to grant delay, as a matter of right, where it would operate to delay jus-

tice or injure the plaintiff, but may refuse to grant time unless the defendant will state the character of the amendment he desires to make. *Cashman v. Anderson*, xxvi. 67. *Robinson v. Lawson*, xxvi. 69.

See SUPRA, I; . . . BOATS AND VESSELS, 65, 77; . . . ERROR, 33; . . . PRACTICE, 84, 88, 291.

IV. JUDGMENTS.

26. A judgment may be amended in form, not only during the term, but at any subsequent term. *Hickman v. Barnes*, i. 156.

27. Where a suit is brought against several and only one is served with process, and judgment by default is taken against all by mistake, (Gey Dig. 241,) the court at a subsequent term may amend the judgment by entering it against him alone who was served; and when the amended judgment is entered without vacating the first, the original must give place to the amended entry, and the latter will, by intendment of law, be considered as entered at the term of the first entry. Clerical errors may be amended at any time. *Jones, J., dis. Hanly v. Dewes*, i. 16.

28. And where two parties were sued, but only one was served, and the plea did not specify for which defendant it was filed, and judgment was rendered against both by mistake—*Held*, that the court had power at any time during the term to correct the judgment, and make it only against the one served with process. *Bergen v. Bolton*, x. 658.

29. In an action of covenant, on a bond for the payment of money, where a demurrer to a plea in bar is sustained, and a judgment for the amount of the bond, with interest, is rendered, without a formal interlocutory judgment, there being merely an entry that the demurrer is sustained, and inasmuch as said declaration is not denied, therefore judgment is given by the court—*Held*, not to be error, but a mere clerical mistake, which might, if material, be amended by the direction of the Supreme Court. *Mullanphy v. Phillipson*, i. 188.

30. The court has no power to modify a judgment after the close of the term at which such judgment was rendered. *Harrison v. The State*, x. 686.

31. Where a new trial is granted, on condition that the defendant pay the costs, there is no irregularity in allowing the plaintiff to amend the judgment, after the order for the new trial is made and before the costs are paid; and where such order, after a lapse of several terms, and before the payment of the costs by defendant, is vacated on motion of plaintiff, the defendant is not entitled to notice of the motion. *Blumenthal v. Kurth*, xxii. 173.

V. RECORDS.

32. Where the plaintiff demurred to the defendant's plea, without craving oyer of the instrument, profert of which was made in the plea, and which instrument was in court, it is not error to allow the omission of oyer to be supplied by an amendment of the record. *Atwood v. Lewis*, vi. 392.

33. From the record of the Supreme Court it appeared that a judgment of affirmance was rendered in a cause, and from the printed opinion of the case, it appeared that it was ordered to be remanded, and that the plaintiff had leave to withdraw his demurrer, and take issue on the plea of the statute of limitations, but there was no evidence that this permission was entered of record—*Held*, that the record should be amended so as to show the fact, by an application to the Supreme Court, before any proceedings are had in the court below. *The State v. St. Gemme*, xv. 219.

See CERTIORARI, 3;....SUPRA, 5, 6;....APPEAL, 78;....ATTACHMENT, 18, 59, 60;....ERROR, 35;....RECOGNIZANCE, 11, 13.

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I. BY ONE OF SEVERAL PARTIES.

1. Where all the defendants will not join in an appeal from a Justice to the Circuit Court, the appellant must summon the others and sever from them. *Perry v. Block*, i. 484.

2. Where there are several defendants in a suit before a Justice, and an appeal is taken by one, judgment cannot be rendered in favor of all of them in the Circuit Court, those who did not appeal not being parties to the record. *Ibid*.

3. Where an appeal from a Justice appears to have been prayed for on the day of trial, by one of two defendants, but the recognizance is entered into by both, the appeal is well taken. *Sargent v. Sharp*, i. 601.

4. Where a judgment is not appealed from by one party, an error in favor of the other cannot be corrected. *Delassus v. Poston*, xix. 425.

II. FROM CHANCERY.

6. A refusal to grant an injunction is not a final determination of the cause, and an appeal from it will not lie. *Tanner v. Irwin*, i. 65. *Harrison v. Rush*, xv. 175.

7. A decree that partition be made between the parties is interlocutory, and no appeal lies from it. *Gudgell v. Mead*, viii. 53. *McMurtry v. Glascock*, xx. 432.

8. Nor will a writ of error lie in such case. *Stephens v. Hume*, xxv. 349.

9. A decree, "that the defendant pay the complainant his costs herein expended, and that execution issue therefor," is not a final decree from which an appeal will lie. *Higbee v. Bowers*, ix. 350.

10. The evidence upon which a decree was predicated should appear in the appellate court, either by being embodied in the decree, or by a case agreed on by a special verdict, or on the record; and if it do not so appear, the decree should be reversed, as the appellate court cannot determine whether the court did right in making the decree. *Risher v. Roush*, i. 702. *Richardson v. Harrison*, iv. 232.

III. FROM CIRCUIT COURT.

11. Under the statute, (R. S. 1825, 633, § 44,) unless the record is filed ten days before the commencement of the term, the Supreme Court will affirm the judgment or dismiss the appeal, unless a satisfactory excuse is given. *Byrne v. Rodney*, i. 742.

12. An appeal cannot be taken until final judgment is rendered. *The State v. Pepper*, vii. 348.

13. Any judgment, order or decree of the Circuit Court, which puts an end to the proceedings before that Court, may be reversed on appeal or writ of error. *Hill v. Young*, iii. 337. *Ex parte McGrade*, xxiv. 125.

14. Thus the judgment of the Circuit Court, on a writ of error reversing a judgment of the County Court, and remanding the same, is final, and may be appealed from. (R. S. 1835, 470, § 7.) *Rankin v. Perry*, v. 501. *Perry v. Alford*, v. 503.

15. But an appeal will not lie from a judgment of the Circuit Court on an incidental matter collateral to the suit. *George v. Craig*, vi. 648.

16. Nor from the refusal of the court to permit a party claiming an interest in a suit pending against others to be made a co-defendant. *Roberts v. Patton*, xviii. 485.

17. A party cannot appeal a second time from the same judgment, the first appeal having been dismissed. He must resort to his writ of error. *Brill v. Meek*, xx. 358.

18. An appeal to the Supreme Court must, under the Statute, (R. S. 1855, 1287, § 11,) be taken during the term at which the judgment or decision was rendered. *Stavely v. Kunkel*, xxvii. 422.

IV. FROM THE LAW COMMISSIONER'S COURT.

19. An appeal lies from the judgment of the Law Commissioner of St. Louis county in actions of replevin. *Lewis v. Price*, xi. 398.

20. A judgment of the Law Commissioner refusing to make an order on a Justice, is not a judgment from which an appeal can be taken. *Ladue v. Spalding*, xvii. 159.

21. A cause cannot be taken by writ of error or appeal from the Law Commissioner's Court to the Circuit Court, but only to the Supreme Court. *Little v. Sellick*, xvi. 269.

V. FROM THE COUNTY COURT.

22. To make an appeal perfect and complete from the County to the Circuit Court, a bond should be given with sufficient security and approved by the County Court, as provided in the statute. (1 Ter. L. 683, § 4.) *Byrne v. Thompson*, i. 443.

23. Where the parties in the County Court consent to an appeal to the Circuit Court, for the judgment of the latter upon the law arising upon the facts of the case, the Circuit Court has full jurisdiction, and may proceed to try the case *de novo*, and its decision upon the facts will be deemed correct where the record does not show the evidence. *Boone County v. Corlew*, iii. 12.

24. The legislature granted to A. an exclusive privilege to keep a ferry on the Missouri river, within certain limits, and provided that a failure to comply with the requisites of the charter should be sufficient to authorize the County Court to establish another ferry within said limits. (Acts 1855, 109.) The County Court granted a license to B. to set up a ferry within the limits granted to A., and A. appealed to the Circuit Court, which court affirmed the judgment, and refused to try the question anew on the facts—*Held*, that, conceding that an appeal would lie, although none was provided for in the act, the court was not bound to try the cause anew. *Lewis v. Nuckolls*, xxvi. 278.

25. The appellate jurisdiction that the Circuit Court exercises over the County Court, does not authorize them to try *de novo* causes appealed from the County Court. *Lacy v. Williams*, xxvii. 280.

26. After an appeal is taken in a cause, and before the transcript is filed in the Appellate Court, the cause must be considered as pending in the Appellate Court. *Foster v. Rucker*, xxvi. 494.

See JURISDICTION, 16 ; . . . SCHOOL LANDS, 3.

VI. FROM THE COURT OF PROBATE.

27. Any person interested and aggrieved is entitled to an appeal; but if his interest is not direct, it must be made clear, on the record, that he is interested, or the court will decide against him. *Zumwalt v. Zumwalt*, iii. 269.

28. The executor of an estate claimed certain property as his own, and the widow of the testator applied to the County Court to compel him to inventory it as the property of the estate, which he was ordered to do—*Held*, that it was not an order or decree from which an appeal lies to the Circuit Court. (See R. S. 1825, 121, §§ 72, 73, 77.) *Davis v. Davis*, iv. 204.

29. An appeal lies from the decision of the County Court, revoking letters of administration; but, *Per M'GRIK, J.*, such appeal does not operate as a *superse-deas* upon the new grant of administration. (R. S. 1835, 63, §§ 1, 5.) *Mul-lanphy v. County Court*, vi. 563.

30. An appeal will lie from an order of the County Court removing the guardian of an insane person. In perfecting such appeal an affidavit and appeal bond are not required. *Hall v. Audrian County Court*, xxvii. 329.

31. Under the statute, (R. S. 1835, 63, §§ 1, 2,) an appeal would not lie from the decision of the County Court on a *scire facias* issued against the sureties of an administrator, for his failure to pay a judgment against him as administrator. (See R. S. 1835, 59, § 14.) *Martin v. Milam*, xi. 602.

32. An appeal does not lie from an opinion of the Probate Court as to the rights of the distributees of an estate, unless there is an order of distribution. *Dyer v. Carr*, xviii. 246.

33. Nor from the entry by the Probate Court of the non-appearance of a party who has given notice of a demand against an estate. The party must commence *de novo*. *Whitcomb v. Whitcomb*, xix. 514.

34. A. was administrator of B., who was, at the time of his decease, of the firm of B. & C., and took charge, under the statute, of the effects of the firm. D. presented to the County Court a claim against said firm, and the demand was allowed—*Held*, that C., the surviving partner, had no right to appeal. *Asbury v. McIntosh*, xx. 278.

35. An appeal lies from the order of the court approving an administrator's sale of real estate. (R. S. 1845, 106, § 1, cl. 6.) *Wilson v. Brown*, xxi. 410.

36. The provision in the act establishing a Probate Court in Buchanan county, (Acts 1850-1, 519, § 3,) allowing an appeal to be taken from a judgment within thirty days, implies that it may be taken in vacation. *Todd v. Gunn*, xxi. 306.

37. A manifest clerical error in the record, making it appear that the appeal was taken before judgment, is no ground for dismissing the appeal, the bond showing that the appeal was taken after judgment, and within the time allowed. *Ibid*.

See ADMINISTRATION, 10 ; . . . WILL, 13.

VII. FROM JUSTICE OF THE PEACE.

a. RIGHT OF APPEAL.

38. Under an act declaring that in cases before Justices, after a trial by jury, the judgment entered by the Justice on the verdict "shall be final and conclu-

sive on both parties, when the demand in question shall not exceed twenty dollars," (1 Ter. L. 307, § 4,) it is the amount demanded in the action, and not the amount of the judgment, which determines the right of appeal. If the demand exceed twenty dollars, the appeal lies, though the judgment be less. *Sipp v. Circuit Court*, i. 356.

b. FROM WHAT JUDGMENT.

39. An appeal from a Justice's Court lies on a judgment of *nil dicit*, without a motion for a new trial. *Thompson v. Curtis*, ii. 209, 229.

40. And on an issue found between the plaintiff in attachment and an interpleader, before the determination of the cause between the plaintiff and defendant. *Weisenecker v. Kepler*, vii. 52.

41. And from the decision of a Justice on an interplea, concerning property or effects garnished by virtue of an execution. *Smith v. Sterritt*, xxiv. 260.

42. But an appeal will not lie from a judgment convicting a slave of petit larceny. *The State v. Joe*, xix. 223.

See BOATS AND VESSELS, 102; . . . EXECUTION, 55; . . . ROADS AND HIGHWAYS, 10.

c. WHEN AND HOW TAKEN.

43. Where an appeal is taken from a decision of a Justice, but is not taken within the time required by law, the Circuit Court must dismiss the appeal. If the appeal prayed for on the day of trial was refused for any insufficient reason, the proper remedy was by *mandamus*, to compel the Justice to do his duty, and testimony brought into the Circuit Court in any other way, to show why the appeal was not taken within the time, is inadmissible. *James v. Robinson* i. 595.

44. The verdict of a jury, as soon as the Justice enters it on his docket, has the effect of a judgment, and an appeal therefrom must be taken within the ten days next following, although the Justice should neglect to enter up a judgment on the verdict in the meantime. (See R. S. 1825, 481, § 23.) *Rutherford v. Wim*, iii. 14. *Cason v. Tate*, viii. 45.

45. And the absence of a Justice is no excuse to a party for not taking an appeal within the ten days allowed by the statute, unless it appears that the Justice was absent the entire period. *Holt v. Varner*, v. 386. See CHANCERY, 111.

46. After judgment by default before a Justice, a defendant cannot appeal without first moving to set aside the judgment. The proviso to § 22 of R. S. 1825, p. 480, was not repealed by § 2 of the act of 1826, (2 Ter. L., 89.) *Barnett v. Lynch*, iii. 369.

47. And the allowance, by a Justice, of an appeal from a judgment by default raises no presumption that an application had been previously made by the party aggrieved to set aside the default. *Burns v. Hunton*, xxiv. 337. 339.

48. Consent to appear and submit to the judgment of the Circuit Court waives all antecedent irregularity in bringing up a case from an inferior court. *Boone County v. Corlew*, iii. 12.

49. Under the statute, (R. S. 1845, 651, §§ 7-10,) a Justice could set aside a nonsuit only in case it was rendered on account of the absence of the plaintiff at the time appointed for trial; and if nonsuit was rendered for any other cause than the absence of plaintiff, a motion to set aside such nonsuit was not necessary to entitle the plaintiff to an appeal. *Hannibal Plank R. Co. v. Robinson*, xxvii. 396.

d. NOTICE.

50. The statute of 1825, relating to Justices' Courts, which directs that "the party appealing shall notify, in writing, the opposite party or his agent," (R. S. 1825, 481, § 23,) was not repealed by the act regulating proceedings at law, (R. S. 1825, 630, § 34,) and a constable serving a notice under the latter act was required to make the prescribed affidavit. *Tiffin v. Millington*, iii. 418.

51. A verbal notice, on the day of trial before a Justice, by a party that he intends to take an appeal, which appeal was not taken until seven days after, is insufficient, under the statute. (See R. S. 1825, 481, § 23.) *Hempstead v. Darby*, ii. 25.

52. In such case, the appellant should give the adverse party notice, in writing, of the appeal. The appeal cannot be considered as taken or "prayed for," until the bond or recognizance be taken or tendered. *Cochran v. Bird*, ii. 141. *Hayton v. Hope*, iii. 53.

53. And the mere reading of the notice in the presence of the appellee is insufficient; it should be delivered to him. *Newbury v. Melton*, iii. 121.

54. Notice of an appeal given by an agent and signed by him in the name of his principal, is good. *Runkle v. Hagan*, iii. 234.

55. But the notice of an appeal from a Justice's Court, served after the lapse of a term of the Circuit Court at which the cause might have been tried, but ten days before the term at which the cause was actually tried, is insufficient. *Newbury v. Melton*, iii. 121.

56. To show notice of an appeal it was proved that the appellee, about nine days before the return term of the Circuit Court, had said that one "R. had served on him a written notice of Brown's appeal." It was also proved that R., about three weeks before the term, had absconded, and had not since been heard from—*Held*, sufficient evidence that legal notice, in writing, was given ten days before the term. *Kelsey v. Brown*, iv. 8.

57. So, where a witness swore that, more than ten days before the first day of the term of the appellate Court, he served on the appellee a notice signed by the appellant that an appeal had been taken, that he did not recollect that the names of the parties were inserted, but believed that they were—*Held*, *prima facie* evidence of notice. *Hughes v. Hays*, iv. 209.

58. Where an appeal is taken after the day of trial, and no notice is given to the appellee, the cause will not be for trial at the first term of the Circuit Court, unless the appellee enter his appearance on the first day of the term, and consent to a trial at that term. (See R. S. 1845, 671, § 22.) *Slater v. St. Bt. Convoy*, x. 513.

59. And if judgment be rendered at the return term against the appellee, without his consent to a trial, it may be set aside at any subsequent term; but to entitle the appellee to set aside such judgment, notice must be given to the appellant. *Masterson v. Ellington*, x. 712.

60. Under the statute, (R. S. 1845, 671, § 22,) notice of an appeal from a Justice is necessary, notwithstanding a continuance has been granted at the first term of the appellate Court for the want of it. An appeal is never properly for trial until notice of it has been given, or until the appellee has done some act from which notice is presumed, or want of it waived. *McCabe v. Le-compte*, xv. 78.

61. A judgment by default cannot be rendered in the appellate Court without giving the adverse party ten days' notice before the commencement of the term. *Pratte v. Corl*, ix. 162.

e. AFFIDAVIT.

62. An appeal from a Justice will be dismissed where the appellant neglects to file an affidavit with the Justice, (2 Ter. L., 283, § 2,) although the law requiring it was then recent and unpublished, and unknown to the appellant. *Townsend v. Finley*, iii. 288.

63. But under the act of 1841, (Acts of 1840-1, 102, § 4,) such affidavit may be filed in the Circuit Court. *Calloway v. Munn*, vii. 567. *Jamison v. Yates*, vii., 571.

64. An affidavit for an appeal from the judgment of a Justice, which states that the appellant "did not appeal, but because he was injured by judgment of the Justice," is sufficient. (See 2 Ter. L., 283, § 2.) *Myers v. Woolfolk*, iii. 348.

65. A writing signed by a party praying an appeal, is not an affidavit until certified by the Justice; and it is error for the Circuit Court to allow the Justice to come into that court and certify the writing. *Price v. Halsed*, iii. 461.

66. An appearance and trial in the Circuit Court is a sufficient recognition and affirmance of the agency of the person who, as agent, took the appeal from the Justice and made the affidavit and recognizance. *Burton v. Collin*, iii. 315.

67. Under the act of February 12, 1839, (Acts 1838-9, 78,) no other person than the party aggrieved could make the affidavit required in taking an appeal from a Justice. *Papin v. Howard*, vii. 34.

f. TO WHAT COURT.

68. Under the act of 1843, (Acts 1842-3, 56, § 2,) which gives the Court of Common Pleas concurrent appellate jurisdiction from judgments of a Justice with the Circuit Court in St. Louis county, appeals should be taken to that court in which it can be first tried, and not necessarily to that court whose sittings commence next after the appeal. *Patten v. Nelson*, xii. 292. (But see R. S. 1855, 1597, § 3.)

69. An appeal from a Justice in St. Louis county, in a suit for trespass on land, must be taken to the Land Court, and not to the Law Commissioner's Court. *Meier v. Eichelberger*, xxi. 148. *Watkins v. Finney*, xxiii. 48.

g. COSTS.

70. If a party who appeals from the judgment of a Justice in St. Louis county to the "St. Louis Court of Common Pleas," fails to pay to the clerk the jury fee, as required by the act of January 29, 1847, (Acts 1846-7, 69, § 3,) the court may, in its discretion, affirm the judgment of the Justice, upon the appellee filing a transcript and paying the fee. *Hardison v. St. Bt. Cumberland Valley*, xiii. 226. *St. Bt. Falcon v. Donohue*, xiii. 231. *White v. Zule*, xiii. 233. *Gordon v. Scott*, xv. 249.

71. So also on appeal to the St. Louis Land Court. *Harley v. McAuliff*, xxiv. 85.

72. Under the act of February 17, 1851, (Acts 1850-1, 241,) the Law Commissioner has no authority to affirm the judgment of a Justice for the reason that the appellant neglected to pay him the fee allowed by that act upon the filing of the appeal papers, (§ 12.) *Hunt v. Hernandez*, xvi. 170. *Boyle v. Skinner*, xvii. 246. And see also *Grassmuck v. Atwell*, xxiii. 63. *Lala v. Canal-boat City of Joliet*, xxiv. 23. *Haist v. Canal-boat City of Joliet*, xxiv. 24. See Costs, 26-28.

h. PROCEEDINGS IN APPELLATE COURT.

aa. *Appeal Dismissed.*

73. After an appeal from a Justice's Court is dismissed, the court cannot render judgment for the debt or reverse the judgment of the Justice. *Thompson v. Curtis*, ii. 209. *Barns v. Holland*, iii. 47. *Runkle v. Hagan*, iii. 234. *Manion v. The State*, xi. 578.

74. An improper refusal of a Justice to grant a continuance, is no ground upon which to dismiss a suit on an appeal to the Circuit Court. *Harper v. Baker*, ix. 115.

75. It is error to dismiss an appeal on account of the smallness of the amount involved. *Harris v. Hughes*, xvi. 599. *Whitsett v. Gharky*, xvii. 325.

76. Or for any error, defect, or other imperfection in the proceedings of the Justice. (R. S. 1845, 670, § 13.) *Matlock v. King*, xxiii. 400.

77. Or because the Justice omitted to render judgment after verdict entered on his docket. *Morse v. Brownfield*, xxvii. 224.

See PRACTICE, 15; . . . SUPRA, 43.

bb. *Amendment.*

78. A Justice may supply omissions in his docket entries on a day subsequent to the trial and appeal, and the transcript in the Circuit Court may be amended therefrom by consent; or the appellant, on motion, may have a *certiorari* to bring up the amended record. *Price v. Halsed*, iii. 461.

79. The cause of action sued on before a Justice cannot be changed in the Circuit Court on appeal to that court. *Smith v. Anthony*, v. 504.

80. Nor can the transcript be so amended as to introduce a new party. *Kraft v. Hurtz*, xi. 109.

81. It is not error to permit the papers necessary to an appeal to be perfected

where objections are taken to them, and then overrule the motion to dismiss the appeal. *Dickerson v. Apperson*, xix. 319.

cc. *Judgment of Affirmance.*

82. In all cases of appeal, the appellate Court must enter up a new judgment of its own, and it is error to simply affirm the judgment of the Justice. (R. S. 1835, 370, § 8.) *Cates v. Akerd*, v. 124.

83. Where the appellant fails to prosecute his appeal, the judgment will be affirmed. Sec. 13, Art. VIII., of the act relating to Justices' Courts, (R. S. 1845, 670,) is qualified by § 16 of the act relating to costs, (R. S. 1845, 244,) and applies only to cases in which the appellant is not in default. *Martin v. White*, xi. 214. *Starr v. Stewart*, xviii. 410. *The State v. Thevenin*, xix. 237. *Milligan v. Dunn*, xix. 643.

dd. *New Defense.*

84. A defense may be made on the trial of an appeal from a Justice which was not made before the Justice. *Hall v. Mills*, xi. 215.

ee. *Trial.*

85. Upon an appeal to the Circuit Court, the trial is to be had *de novo*, and no act of the Justice can be assigned for error. *Atwood v. Reyburn*, v. 533. *Harper v. Baker*, ix. 115.

86. The new code does not apply to the trial of a cause appealed from a Justice. In such cases it is still proper to ask declarations of law from the court on a trial without a jury. *Soutier v. Kellerman*, xviii. 509. *Coffman v. Harrison*, xxiv. 524.

ff. *Evidence.*

87. In appeals from a Justice, the same rule of evidence governs in the appellate Court as before the Justice. (See R. S. 1835, 361, § 17.) *Atwood v. Reyburn*, v. 555.

See MANDAMUS, 20 PRACTICE, 104, 188, 204.

i. BY ONE OF SEVERAL PARTIES. See SUPRA, II.

See BOATS AND VESSELS, XIII; . . . BREACHES OF THE PEACE, 15; . . . CRIMINAL LAW, XVI; . . . ERROR, 16; . . . FORCIBLE ENTRY AND DETAINER, IV; . . . HABEAS CORPUS, 3; . . . LAWS, 59; . . . LOCAL DECISIONS, 3; . . . MANDAMUS, VII; . . . RECOGNIZANCE, II; . . . REVENUE, 36; . . . ROADS AND HIGHWAYS, 10, VIII.

ARBITRATIONS AND REFERENCES.

I. AGREEMENT TO REFER.

II. PROCEEDINGS BY ARBITRATORS AND REFEREES.

III. AWARD.

IV. SETTING ASIDE AWARD.

V. CONFIRMATION OF AWARD.

VI. ACTION THEREON.

VII. COSTS.

I. AGREEMENT TO REFER.

1. An agreement to refer a matter in dispute to arbitrators, cannot be specifically enforced. *King v. Howard*, xxvii. 21.

II. PROCEEDINGS BY ARBITRATORS AND REFEREES.

2. By a submission in writing, under a rule of court, the parties referred the matters in difference between them to C. and D. as arbitrators, with power, in case of disagreement, to select a "third person or more," before they entered upon the discharge of their duties. C. and D., not being able to agree, referred the whole matter to E., F., and G., who made an award—*Held*, that it was not necessary that C. and D. should have been sworn, or that they should have concurred in the award of the others by signing and sealing it. *Scudder v. Johnson*, v. 551.

3. Arbitrators were sworn "faithfully and impartially to discharge their duties as arbitrators in a matter submitted to them by A. and B., by articles of agreement," etc.—*Held*, to be a substantial compliance with the oath required by the statute. (R. S. 1845, 122, § 3.) *Vaughn v. Graham*, xi. 575.

4. All submissions in writing are so far within the statute, (R. S. 1845, 121,) that an oath taken by the arbitrators pursuant to the statute is not extrajudicial, although the terms of the submission do not provide for judgment to be rendered by the Circuit Court; so that, if afterwards the parties amend the submission to provide for such judgment, it is not necessary for the arbitrators to be re-sworn. *Bridgman v. Bridgman*, xxiii. 272.

5. Under Art. XVI of the new code there is a distinction between a referee and a commissioner. A referee is named by the consent of the parties, but a commissioner can only be appointed where the parties do not agree on a reference. *Walton v. Walton*, xvii. 376.

6. A referee should proceed according to the act concerning arbitrations and references, (R. S. 1845, 121,) and should find the facts upon which his judgment is based, and report the testimony of witnesses taken before him. His report becomes the judgment of the court, and can only be reviewed in the manner prescribed in the new code. (Acts 1848-9, 90, § 3.) *Ibid*.

7. A commissioner, appointed under the new code, (Acts 1848-9, 91, § 5,) will proceed in the manner pointed out by Art. IV of the statute relating to Chancery practice, (R. S. 1845, 845.) His proceedings, after being passed upon by the court below, will be reviewed in the Supreme Court on appeal or writ of error, the report being made a part of the record by a bill of exceptions. *Ibid*.

8. Referees have no power to dismiss a suit because of the refusal of the

plaintiff to give his deposition when called upon by the defendant. They should report the matter to the court. *Coburn v. Tucker*, xxi. 219.

9. And in case of such dismissal, it is a proper exercise of the discretion of the court to set aside their report, upon the plaintiff filing an affidavit purging the contempt. *Ibid.*

10. An umpire chosen by arbitrators upon their own disagreement to decide the matter submitted to arbitration, must be sworn before he can hear the evidence in the cause. *Frissell v. Fickes*, xxvii. 557.

11. Where a matter in dispute is submitted to arbitrators with a power on their part, in case of a disagreement, to call in an umpire, the umpire may be appointed before the arbitrators commence their investigation, or at any stage of the proceedings; he ought to see and hear the witnesses. *Ibid.*

12. It does not invalidate an award that the arbitrators join with the umpire in making the same. *Ibid.*

13. Where, in a submission to arbitration, the matter in dispute is stated to be the "taking of timber from the land" of the plaintiffs, the arbitrators would not be authorized to assess treble damages. *Ibid.*

III. AWARD.

14. Where arbitrators, in making their award, recite the mode of their appointment incorrectly, as that they "were appointed by bond," when the appointment was by writing unsealed, the award is not thereby vitiated. *Magoon v. Whiting*, i. 613.

15. An award made on a submission under the statute is incomplete until signed by the arbitrators, and attested by a subscribing witness, (R. S. 1835, 71 § 6.) Until this is done, its delivery to the parties is nugatory. It may be done at any time after. The attestation of the witness may be made on the return of the award, by the order of the court. *Newman v. Labeaume*, ix. 29.

16. The plaintiff and defendant on the 25th of September, entered into articles to submit certain matters of controversy between them to arbitrators. One of the terms was, that the award should be made and published within ten days from the date thereof. The award was made, written out, signed and witnessed on the 4th of October following—*Held*, to be a sufficient publication of the award within the time. *McClure v. Shroyer*, xiii. 104.

17. A referee need not report his decision in admitting or rejecting a witness or testimony, unless required so to do by the order of reference. *The State v. Petticrew*, xix. 373.

IV. SETTING ASIDE AWARD.

18. Mere errors of law, or incorrect conclusions as to facts, do not of themselves constitute sufficient ground for the setting aside of an award. Corruption, partiality, or some misconduct of the arbitrators calculated to prejudice the rights of the party, must be shown. *Newman v. Labeaume*, ix. 29.

19. Nor will an award be set aside because of the admission of illegal evidence, nor for an error of judgment, no partiality nor misconduct being shown. (See R. S. 1845, 122, § 9.) *Vaughn v. Graham*, xi. 575. *Bridgman v. Bridgman*, xxiii. 272.

20. Nor because one of the parties was unable to attend before the arbitrators, on account of the obstruction of the roads by high water. *Shroyer v. Barkley*, xxiv. 346.

21. An award made under a common law reference cannot, in action at law, be resisted on the ground of unfairness in obtaining it, or for errors of judgment in the referees. It can only be set aside in equity. *Finley v. Finley*, xi. 624.

22. The arbitrators, before whom the plaintiff and defendant had submitted their matters of dispute, allowed to the plaintiff a demand which the defendant owed him as administrator. Upon the trial before the arbitrators, the defendant did not object to the nature of the claim, but only to the amount of it—*Held* not to be sufficient cause to vacate the award. *McClure v. Shroyer*, xiii. 104.

23. Where it appears that arbitrators heard the evidence before they were sworn, their award was properly vacated. *Toler v. Hayden*, xviii. 399.

24. Where an agreement to submit a matter in dispute to arbitration describes the subject of dispute as “a matter in difference between the parties,” and the parties afterwards appear and litigate a matter without any denial that it is the subject of dispute between them, they should not afterwards be permitted to object to the vagueness and indefiniteness of the agreement. *Price v. White*, xxvii. 275.

V. CONFIRMATION OF AWARD.

25. Where notice is given that a motion will be made in court on the first Monday of May for the confirmation of an award, and the Legislature afterwards changes the time of holding the court, the notice will be sufficient; the party to whom the notice is given must take notice of the change. *Price v. White*, xxvii. 275.

VI. ACTION THEREON.

26. An agreement between A. and B., under seal, provided, that in consideration that A. should give possession of certain public land to B., B. should pay the value of the improvements, to be ascertained by five householders, &c.—*Held*, that the decision of the persons thus selected is not an award upon which an action can be brought. The remedy is on the agreement. *Jarred v. Macey*, x. 161.

27. In an action on an award, it is only necessary for the plaintiff to set out so much of it as shows his right to recover. If there be any matter in the award constituting a defense, it must be set up by plea. *Finley v. Finley*, xi. 624.

VII. COSTS.

28. Arbitrators have power, under the statute (R. S. 1845, 124, § 16,) to award costs against either party, unless they are expressly prohibited from so doing by the terms of the submission. *McClure v. Shroyer*, xiii. 104.

See CONSIDERATION, 36.

ASSIGNMENT.

- I. ASSIGNMENT OF CHOSSES IN ACTION.
- II. ASSIGNMENT OF ACCOUNT.
- III. ASSIGNMENT OF BANK NOTES.
- IV. ASSIGNMENT OF CONTRACT OF CONVEYANCE.
- V. ASSIGNMENT IN TRUST FOR CREDITORS.

- a. GENERALLY.
- b. VALIDITY AND EFFECT.
- c. AVOIDANCE OF.
- d. CONSIDERATION.
- e. ASSENT OF CREDITORS.
- f. PREFERRING CREDITORS.
- g. POSSESSION WHILE ASSIGNMENT IS EXECUTORY.
- h. DESCRIPTION OF THE PROPERTY.
- i. DEFAULT OR NEGLIGENCE ON THE PART OF THE ASSIGNEE.
- j. HIS LIABILITY.
- k. ACTION BY AND AGAINST.
- l. FOREIGN ASSIGNMENTS.
- m. FRAUDULENT ASSIGNMENTS.

I. ASSIGNMENT OF CHOSSES IN ACTION.

1. It is well settled, that courts of law will protect the rights of an assignee of a chose in action against all persons having notice of such assignment, express or implied. *Laughlin v. Fairbanks*, viii. 367.

2. A chose in action is assignable in equity, and the assignee may sue in his own name. *Dobyns v. McGovern*, xv. 662.

3. If, after a chose in action is transferred by its owner, it is by him assigned a second time, and the last assignee first gives notice to the debtor of his right, his equity will be superior to that of the first assignee who has neglected to give notice. *Murdoch v. Finney*, xxi. 138.

II. ASSIGNMENT OF ACCOUNT.

See BONDS, NOTES AND ACCOUNTS, 39, 40.

III. ASSIGNMENT OF BANK NOTES.

4. M., with the plaintiff, forwarded to the defendant for adjustment a package of bank notes, which were in discredit. The package was sent in the name of M., who subsequently assigned the notes to the defendant in settlement of a pre-existing debt—*Held*, that the defendant was a *bona fide* holder of the notes, without notice of the plaintiff's interest in them, and without accountability to him therefor, and that it made no difference that no farther credit was given by the defendant to M. on account of them. *Clark v. Loker*, xi. 97.

IV. ASSIGNMENT OF CONTRACT OF CONVEYANCE.

5. If A. contracts to convey to B. one of four quarter sections, to be selected by B., the assignment of the contract does not assign the right of choice. *McQueen v. Chouteau*, xx. 222.

V. ASSIGNMENT IN TRUST FOR CREDITORS.

a. GENERALLY.

6. An assignment for the benefit of creditors is not valid against an attachment levied on the property assigned, without proof that the persons for whose benefit the assignment is made are *bona fide* creditors. *Hughes v. Ellison*, v. 463. *Crow v. Ruby*, v. 484.

7. But a deed of assignment is *prima facie* evidence that the persons named therein as creditors are really such. *Gates v. Labeaume*, xix. 17.

8. Under the statute, (Acts 1840-1, 14, §§ 10, 11,) the court cannot enter up a judgment on the finding of an issue made under the provisions of that section. *West v. Miles*, ix. 167.

9. Such finding is not subject to appeal or writ of error. *Ibid.*

b. VALIDITY AND EFFECT.

10. An assignment to secure accommodation indorsers is valid, although such indorsers have not made any payments, on account of their liability. *Duval v. Raisin*, vii. 449.

11. The validity of a deed of assignment, alleged to be fraudulent, may be tried in a court of law, upon an issue made between an attaching creditor and the assignee, summoned as garnishee under the provisions of the law relating to attachments, (Acts 1838-9, 6.) [OVERRULING *Van Winkle v. McKee*, vii. 435.] *Lee v. Tabor*, viii. 322.

12. A deed of assignment is not void for the reason that a clause in it provides that the assignees shall not pay costs which have accrued or may accrue on debts by suit. *Gates v. Labeaume*, xix. 17.

13. Where creditors are to become parties to an assignment, and before they do so by executing it on their part, the assigned property is attached, the sheriff will hold against the assignee. *Swearingen v. Slicer*, v. 241.

C. AVOIDANCE.

14. Where an assignment is sought to be avoided on the ground of its invalidity as to creditors, the party seeking to avoid it must show that he is a creditor, and it is not sufficient to show that an execution in his name was levied upon the assigned property. He must produce the judgment upon which the execution issued. *Wright v. Crockett*, v. 125.

15. And where the judgment was rendered by a Justice, the entire transcript of the case from the Justice's docket must be produced. *Dameron v. Williams*, vii. 138.

16. The validity of an assignment cannot be questioned by those creditors who voluntarily, and with full knowledge, become parties to it, although it may be void as to others. *Burrows v. Alter*, vii. 424. *Martin v. Maddox*, xxiv. 575.

d. CONSIDERATION.

17. A deed of assignment to a trustee for the benefit of creditors is for a valuable consideration. *Gates v. Labeaume*, xix. 17.

e. ASSENT OF CREDITORS.

18. An assignment for the benefit of such creditors as should, within a given time, become parties to it, and thereby release the assignor from all further liability, (the balance of assets, if any, to go to any remaining creditor,) will not prevail against an attachment made before the trustee takes possession of the assigned property, although the attachment was subsequent to the execution of the assignment. *Hughes v. Ellison*, v. 463.

19. Such assignment, if not void for the stipulation of release, would not have effect until it was executed by the creditors. *Drake v. Rogers*, vi. 317.

20. A debtor cannot make an assignment of his property in trust for the payment of his debts so as to bind creditors not assenting thereto. *Per TOMPKINS, J. Thomas v. Reynolds*, vi. 462.

21. The assent of creditors to an assignment made for their benefit, and which contains no provisions prejudicial to them, will be presumed. *Duwall v. Raisin*, vii. 449.

22. A conveyance by a debtor, without the knowledge of his creditor, to a trustee, to secure a debt, is valid, unless within a reasonable time after the act comes to the knowledge of the creditor he disclaims it. *Major v. Hill*, xiii. 247.

23. In a conveyance to trustees for the benefit of creditors, it was required that the creditors should sign it, in order to receive any benefit from it; but none signed it—*Held*, that this did not render the conveyance void as matter of law. *Gale v. Mensing*, xx. 461.

f. PREFERRING CREDITORS.

24. A debtor may make a general assignment of all his property in trust for the benefit of his creditors, and therein prefer one class of creditors to another, and that after suit brought by some of the creditors embraced in the general assignment. *Bell v. Thompson*, iii. 84. [But see R. S. 1855, 210, § 39.]

25. And such an assignment is good, although it contain no list of creditors or schedule of property, or a defective list or schedule. *Deaver v. Savage*, iii. 252. *Brown v. Knox*, vi. 302.

26. But an assignment for the benefit of such creditors as should, within a limited time, release the assignor from all further liability, is void. *Swearingen v. Slicer*, v. 241. *Brown v. Knox*, vi. 302.

27. The statute (R. S. 1855, 210, § 39,) does not invalidate partial assignments for the benefit of a portion of the creditors of the assignor, but operates to annul all provisions in such partial assignments which give preferences among the designated creditors. *Shapleigh v. Baird*, xxvi. 322. *Woods v. Timmerman*, xxvii. 107.

28. Such an assignment will not be wholly invalidated, but the title to the assigned property will pass to the trustee and the provision making preferences will be entirely disregarded. *Bryan v. Brisbin*, xxvi. 423.

29. And a provision in an assignment providing for the payment of a particular debt of a designated creditor would be valid. *Woods v. Zimmerman*, xxvii. 107.

g. POSSESSION WHILE ASSIGNMENT IS EXECUTORY.

30. A deed conveying to a trustee a stock of goods, for the benefit of creditors, but providing that the grantor may continue to have possession, sell and dispose of the same in the regular or usual course of his business, until default is made in the payment of some of the notes intended to be secured, is void as a matter of law. *Brooks v. Wimer*, xx. 503. *Walter v. Wimer*, xxiv. 63. *Martin v. Maddox*, xxiv. 575. *Stanley v. Bunce*, xxvii. 269.

31. And such an assignment will not be aided by a subsequent deed of the grantor to the trustee, relinquishing all the rights so reserved to him under the first assignment. *Martin v. Rice*, xxiv. 581.

32. But such assignment is valid as against creditors who have assented to and affirmed it. *Martin v. Maddox*, xxiv. 575.

h. DESCRIPTION OF THE PROPERTY.

33. A deed of assignment conveying "one bundle of orders, two bundles of notes, and two bundles of accounts," is void for uncertainty. *Crow v. Ruby*, v. 484.

i. DEFAULT OR NEGLIGENCE ON THE PART OF THE ASSIGNEE.

34. Negligence or delay on the part of the assignee, in making out a schedule of assets and liabilities, which are referred to in the assignment as a part thereof, will not vitiate such assignment. *Duval v. Raisin*, vii. 449.

35. The omission of an assignee to file an inventory, give security, or to dis-

charge any other duty imposed by the statute, (R. S. 1845, 127,) cannot destroy the rights of the creditors under the assignment. *Hardcastle v. Fisher*, xxiv. 70.

36. The term "voluntary" in the statute (R. S. 1855, 202, § 1,) is used as opposed to compulsory, and a conveyance to a creditor in trust for himself as well as the other creditors of the assignor, is such an assignment as is contemplated in the statute, and in such case it is necessary for the assignee to file an inventory. *Manny v. Logan*, xxvii. 528.

j. HIS LIABILITY.

37. Where a creditor sells at auction, in good faith, goods which have been assigned to him to secure his debt, he is liable only for the proceeds, although largely below their original cost. *Cohen v. Wolfe*, xii. 213.

k. ACTION BY AND AGAINST ASSIGNEE.

38. Where an assignee, or person beneficially interested, brings an action in the name of the assignor, the defendant cannot avail himself of the plaintiff's want of interest. *Labeaume v. Sweeney*, xvii. 153.

39. A general conveyance of all debts "that may be due" to the grantor at a specified subsequent date, without a schedule, passes to the grantee such a title as will enable him to recover from a subsequent general assignee of the grantor at least all accounts contracted, (or the money collected upon them,) though not due at the date of the conveyance. *Page v. Gardner*, xx. 507.

40. Neither an original general assignee, nor one substituted by the appointment of the court, in possession of chattels claimed under the assignment, will be protected from suit by a party claiming the same chattels under a conveyance from the assignor previous to the assignment, on the ground of being an officer or quasi officer of the court. *Ibid.*

See RECORD, 8.

l. FOREIGN ASSIGNMENTS.

41. The validity of an assignment for the benefit of creditors, made in another State, and operating upon property in this State, will be determined by the laws of this State where the suit is pending. *Brown v. Knox*, vi. 302. *Bryan v. Brisbin*, xxvi. 423.

m. FRAUDULENT ASSIGNMENTS.

42. A debtor, in failing circumstances, assigned all his property for the benefit of certain preferred creditors, by a deed which contained a provision, directing the surplus, if any, after paying the enumerated debts, to be paid to the grantor—*Held*, that the assignment was not fraudulent as to other creditors, where it appears that the whole property was insufficient to pay even the preferred debts. *Richards v. Levin*, xvi. 596.

43. Evidence tending to show fraud on the part of the assignor after the deed of assignment is executed, but no fraud being proved against the assignees, will

not render void the assignment. *Gates v. Labeaume*, xix. 17. *Wise v. Wimer*, xxiii. 237.

44. Where property is conveyed by a debtor in trust for the benefit of his creditors, and, at the trustees' sale thereof, is purchased for the use and benefit of the debtor, or with money furnished by him, the title of the purchaser is not valid against the creditors of such debtor. *Gutzwiller v. Lackman*, xxiii. 168.

45. But a creditor who knowingly acquiesces in the sale made by a trustee under an assignment for the benefit of creditors, and accepts his share of the proceeds, is estopped from denying the validity of the sale. *Ibid.*

46. The attempt, in an assignment for the benefit of creditors, to secure fraudulent claims, neither the assignee nor creditors being cognizant of it, will not vitiate the assignment as to the other creditors; the assignment will in such case be held void as against the fraudulent claimant, and good in favor of the honest creditors. *Hardcastle v. Fisher*, xxiv. 70.

47. And the effect of impeaching such a claim for fraud is, that the share which would otherwise go to its payment, sinks into the residue for the benefit of the other creditors under the assignment; but an attaching creditor cannot take it by a garnishment of the assignees. *Ibid.* See FRAUDULENT CONVEYANCES, II;...PARTNERSHIP, 20, 21;...SECURITIES, 43.

See ACTION, 19;...BILLS OF EXCHANGE AND PROMISSORY NOTES, IX;...BONDS, NOTES, AND ACCOUNTS, III....COVENANT, 55;...DEED OF TRUST, IV;...EVIDENCE, 49;...JUDGMENT, IV;...LANDLORD AND TENANT, 16, 17;...MORTGAGE, IV;...PUBLIC LANDS, 26;...RAILROADS, 4.

ASSUMPSIT.

I. WHEN MAINTAINABLE.

- a. GENERALLY.
- b. ON EXPRESS CONTRACT.
- c. ON CONTRACT UNDER SEAL.
- d. ON PROMISE TO ONE PARTY FOR THE BENEFIT OF ANOTHER.
- e. WAIVER OF TORT.
- f. FOR MONEY HAD AND RECEIVED.
- g. FOR WORK AND LABOR, AND GOODS SOLD.

II. BY WHOM.

III. DECLARATION AND PLEADINGS.

IV. EVIDENCE.

V. DAMAGES.

I. WHEN MAINTAINABLE.

a. GENERALLY.

1. Privity is not necessary to enable a party to maintain either trover or assumpsit. Thus, where A., owning a horse, sold him to B., and the horse

strayed back, and again came into the possession of A., who refused again to deliver him to B., and A. then sold and delivered him to C., and B. thereupon sold him to D.—*Held*, that D. might maintain an action of assumpsit against C. for the value of the horse. *Floyde v. Wiley*, i. 643.

2. Payment of the amount due upon an execution, and returning the same satisfied, by an officer, without the request of the defendant, does not raise an implied promise to pay the debt by the defendant, on which assumpsit can be maintained. *Bailey v. Gibbs*, ix. 44.

3. M. gave L. a letter of credit, on which goods were obtained—*Held*, that M., by paying for the goods so sold, is entitled to recover of L., although the goods were charged to L. and D., and is presumed to have paid at the request of L., although no suit had been brought against him. *Lindsay v. Moore* ix. 175.

4. At the request of B., one of a firm composed of A. and B., C. became surety for A. on a note given by the latter in his individual name, but the proceeds of which went to the benefit of the firm—*Held*, that such request did not make B. liable to C. for money paid by him as security on such note in the absence of an express promise of indemnification. *Asbury v. Flesher*, xi. 610.

5. Where a party is entitled to a certain proportionate part of a fund received to his use by another, he can maintain assumpsit for it. *Robbins v. Alton Ins. Co.*, xii. 380.

6. The defendant agreed to pay the plaintiff, who was about visiting Europe, one hundred dollars if he would go to a certain town and bring back with him on his return, his (the defendant's) son. The plaintiff went to the place and found the son, but was prevented from bringing him away in consequence of the interference of his mother (the defendant's wife)—*Held*, that assumpsit would lie for the value of the services. *Lemp v. Streiblein*, xii. 456.

7. Assumpsit will not lie to recover back the purchase money recited in a deed on failure of title. *Templeton v. Jackson*, xiii. 78.

b. ON EXPRESS CONTRACT.

8. Assumpsit for goods sold and delivered will not lie unless there is a contract of sale, express or implied. *Johnson v. Strader*, iii. 359.

9. Nor will general assumpsit lie for the recovery of a claim embraced in an express contract which is not rescinded and is unexecuted. *Stollings v. Sappington*, viii. 118. *Christy v. Price*, vii. 430.

10. But where a contract is executed except the payment of the money, it may be recovered under the general counts in assumpsit. *Ingram v. Ashmore*, xii. 574.

11. When work is done under a special contract, but not in compliance with its terms, and the work is nevertheless accepted, a recovery may be had for it in assumpsit, on a general count for work and labor. *Thompson v. Allsman*, vii. 530.

12. Where a wood-boat had been sunk by the mismanagement of the captain of a steamboat, a promise by him to replace it with another, or to pay one hundred and fifty dollars for it, will not sustain a count upon an account stated. *Rutledge v. Moore*, ix. 533.

C. ON CONTRACT UNDER SEAL.

13. Assumpsit will not lie for the recovery of the value of services rendered under a sealed contract. *Crump v. Mead*, iii. 233. *Brown v. Gauss*, x. 265.

D. ON PROMISE TO ONE PARTY FOR THE BENEFIT OF ANOTHER.

14. Where A., for a valuable consideration, makes a promise to B. for the benefit of C., an action thereon may be maintained in the name of either B. or C. *Belt v. McLaughlin*, xii. 433. And see *Bank of Missouri v. Benoist*, x. 519.

E. WAIVER OF TORT.

15. Where the property of B. comes into the possession of M., who converts it to his own use, B. may waive the tort and bring assumpsit. *Floyd v. Wiley*, i. 430. *Same Case*, i. 643.

16. Where a party sells personal property to another, and after receiving the pay for it converts it to his own use, he is liable, under the common counts in assumpsit, to the purchaser for the price paid and interest. *Henderson v. Skinner*, xiii. 99.

F. FOR MONEY HAD AND RECEIVED.

17. Assumpsit for money had and received will lie for money recovered of the plaintiff in an attachment suit instituted in another State, where, at the time of the recovery, the debt due to the party attaching had been paid. *Schlatter v. Hunt*, i. 651.

18. And may be maintained against a sheriff for money collected by his deputies under an execution; or suit may be brought on his bond. *Evans v. Hays*, i. 697.

19. So it lies for the recovery of money paid on a contract for the purchase of land which the other contracting party is unable to convey; but in declaring specially on such contract, the nature and extent of the inability must be set forth. *Philipson v. Bates*, ii. 116.

20. So it lies against an attorney, who, having a debt for collection, receives in payment debts on himself, or on others, without authority from his principal. *Houx v. Russell*, x. 246. See *Beardsley v. Root*, 11 *John. Rep.*, 465.

21. So it lies for currency, and no demand is necessary to entitle a party to a recovery of it after the Bank had rendered an account claiming the money as her own. *Bank of Missouri v. Benoist*, x. 519.

22. But a count for money had and received is not supported by proof of money loaned. *Bank of Missouri v. Scott*, i. 744.

23. R. and others were jointly interested in certain lands which were conveyed to him to sell for the benefit of the proprietors—*Held*, that R., having sold the land, was accountable to a joint owner for his share in an action of assumpsit for money had and received. *Musick v. Richardson*, vi. 171.

24. Where articles of co-partnership have been obtained by fraud, and money

paid thereon, the person defrauded may treat the articles as a nullity, and recover his money on the common count in assumpsit for money had and received. *Magoffin v. Muldrow*, xii. 512.

25. The plaintiff furnished to the defendant five hundred dollars, with which to enter certain lands for him. The defendant used a part of the money in entering the lands and appropriated the balance to his own use—*Held*, that the plaintiff might recover, under the common counts in assumpsit, the amount not applied in entering land, together with six per cent. interest thereon. *Henderson v. Skinner*, xiii. 99.

G. FOR WORK AND LABOR AND GOODS SOLD.

26. In an action of assumpsit—where the declaration contains a count on a special agreement that work shall be done in a certain way, be completed at a particular time, and be paid for in property at a specified price, and a count for work and labor done, and also on an account stated, and the work was not done at the time nor in the manner specified in the contract—the plaintiff, upon a variance appearing between the agreement declared on, and that offered in evidence, cannot recover the value of the work upon the count for work and labor. But he might so recover under a count for work and labor on a *quantum meruit* or *quantum valebat*. *Labeaume v. Hill*, i. 42.

27. The defendant contracted for two hundred barrels of a certain size and quality, and received two hundred barrels of a different size and quality—*Held*, that he was liable for their value, as it did not appear that they were received under the contract. *Murray v. Farthing*, vi. 251.

28. Where the defendant gave his acceptance to the plaintiff for the amount of a bill of goods, and the acceptance was protested for non-payment, the plaintiff may recover for the goods in assumpsit on a count for goods sold and delivered. *Sweeney v. Willing*, vi. 174.

29. The law will not imply a promise to pay for work which is of no benefit to a party. *Medlin v. Brooks*, ix. 105.

30. Although a party who does work under a special contract cannot recover the price under the common counts while the contract remains unexecuted, yet he may recover under the common counts the price of extra work not embraced in the special contract. *Powell v. Buckley*, xiii. 317.

II. BY WHOM.

31. One partner cannot maintain assumpsit against another while the partnership affairs remain unadjusted. *Stothert v. Knox*, v. 112. *Springer v. Cabell*, x. 640. *McKnight v. McCutchen*, xxvii. 436.

32. Where A. and B. contract with C. to do certain work, and to advance to him a certain amount of money thereon, which they do, and the contract is subsequently rescinded, A. and B. must join in a suit to recover back the advances, although the money was in fact furnished by A. alone. *Welles v. Gaty*, ix. 561.

III. DECLARATION AND PLEADINGS.

33. The rule being that, on a count of general *indebitatus assumpsit*, an express promise may be given in evidence, a general demurrer to a declaration for use and occupation should be overruled, so as to give the plaintiff an opportunity to prove an express promise. *Rector v. Ranken*, i. 371.

34. Where to a declaration in assumpsit there is a plea of payment on the first day of June 1822, and a replication to this plea that the defendant did not pay, &c., on the first day of June 1822—*Held*, that the issue thus formed was material. *Ashley v. Bird*, i. 640.

35. In an action of assumpsit, on a joint contract, only the parties liable can be joined as defendants. If others are joined it is error, and fatal even after verdict and judgment. *Hempstead v. Stone*, ii. 65.

36. The issue is material and well taken, where the plaintiff traverses the defendant's plea, which alleged that the note sued on was obtained from him by the plaintiff fraudulently. *Price v. Cannon*, iii. 453.

37. Where the note sued on is without date, it may be alleged to have been executed on any day, but the words "dated" and "bearing date," being descriptive, must be omitted, since otherwise there will be a variance between the declaration and evidence. *Grant v. Winn*, vii. 188.

38. The pleader, in declaring on a contract, may set it out according to its legal effect in direct terms, but not by way of innuendo. *Pye v. Rutter*, vii. 548.

39. Where the payees in a note are described as surviving partners, it is not necessary to state the description of the payees in a declaration on such note. *Freeman v. Camden*, vii. 298.

40. A declaration in assumpsit on a promissory note must aver a promise on the part of the defendant, and a failure to do so is fatal, even after verdict. *Muldrow v. Tappan*, vi. 276. *McNulty v. Collins*, vii. 69.

41. And so in an action of covenant. *Perkins v. Reeds*, viii. 33.

42. Under the statute of February 13, 1839, (Acts 1838-9, 99,) permitting the plaintiff to join as many defendants in an action *ex contractu* as he chooses, the defendants may plead separately, *Austin v. Feland*, viii. 309.

43. In an action on a note given for the purchase of a tract of land, a plea alleging a want of title in the vendor, should show specifically the defect in his title. It is not sufficient to allege generally that he had no title, or that the fee simple is in another. *Copeland v. Loan*, x. 266.

IV. EVIDENCE.

44. In an action of assumpsit on a promissory note, want of consideration or fraud may be given in evidence under the plea of *non assumpsit*. *Block v. Elliott*, i. 275.

45. In an action for money laid out by the plaintiff for the defendant, the admission of the defendant that the plaintiff had paid and lifted a certain note due from him, is admissible to support the action. *Graves v. Beard*, i. 747.

46. Evidence inapplicable under a special count in assumpsit may be received in support of a general count. *Camster v. Shannon*, ii. 94.

47. In assumpsit for money paid to the use of defendant, the record of a judgment in Kentucky is admissible to prove a recovery against the plaintiff and defendant for the same thing, and that the plaintiff paid the amount; and it may then be shown by other evidence that the plaintiff was a mere security. *Davidson v. Peck*, iv. 438.

48. It is not necessary to the admission of such testimony, going to prove the actual relation of the parties, that the deposition containing it should recite the record. *Ibid.*

49. Assumpsit on a bill of exchange, drawn on one S. by the plaintiff in favor of the defendant, and by the defendant indorsed to the plaintiff—*Held*, that as no special circumstances were alleged rebutting the presumptions arising from the position of the parties on the bill, the plaintiff could not recover. *Thoms v. Green*, vi. 482.

50. *Quære*, whether the plaintiff could recover in such a case, if it had been alleged and proved, that the plaintiff drew the bill for the accommodation of the defendant, and that the defendant indorsed it to the plaintiff to pay an indebtedness of the drawee to him. *Ibid.*

51. A plea which simply puts in issue the title of the plaintiffs to the note sued on, admits the partnership of the plaintiffs as alleged in the petition. *Arthur v. Pendleton*, vii. 519.

52. A note payable in currency is admissible in evidence under the money counts. *Floating Dock Ins. Co. v. Soulard*, viii. 665.

53. Where a declaration, founded on a promissory note, contains a special count and the common counts, the note is admissible in evidence on the common counts, and it is immaterial whether it sustains the special count or not. *Swearingen v. Orne*, viii. 707.

54. Evidence that the defendant had given witness a draft on the plaintiff, and that the plaintiff, when the order was presented, promised to pay it but did not, and that at the same time the plaintiff said he was indebted to the defendant five or six hundred dollars, and that their business was unsettled, is admissible under a plea of non assumpsit. *Haden v. Herndon*, ix. 854.

55. A written agreement, not under seal, which has been executed, need not be declared upon, but may be given in evidence in support of the common counts in an action of assumpsit. *Carroll v. Paul*, xvi. 226.

V. DAMAGES.

56. Where goods which have been conveyed by two mortgages are sold on a landlord's warrant, and an action of assumpsit for money had and received is brought by the older mortgagee against the landlord, he is entitled to recover only the amount due on his mortgage, and not in addition to the amount due on the junior mortgage. *Glasgow v. Ridgeley*, xi. 34.

57. Though a builder, where he abandons a building contract before com-

pleting it, may recover for his labor and materials, if received and of value to the other party, yet the damages caused by the non-performance of the contract may be deducted from the value of the work and materials. *Lee v. Ashbrook*, xiv. 378.

ATTACHMENT.

- I. GROUNDS OF ATTACHMENT.
- II. AFFIDAVIT.
- III. BOND.
 - a. ATTACHMENT BOND.
 - b. DELIVERY BOND.
 - c. BOND GIVEN ON DISSOLUTION OF ATTACHMENT.
 - d. DAMAGES.
- IV. PARTIES.
- V. WHAT IS ATTACHABLE.
- VI. PROCESS.
 - a. THE WRIT.
 - b. SERVICE.
 - c. LEVY.
 - d. RETURN.
- VII. PLEA IN ABATEMENT.
- VIII. EVIDENCE.
- IX. PLEADING AND PRACTICE.
- X. LIEN.
- XI. JUDGMENT.
- XII. IN AID OF OTHER ACTIONS.
- XIII. TRIAL OF THE RIGHT OF PROPERTY.
- XIV. SALE.

I. GROUNDS OF ATTACHMENT.

1. A. being indebted to B. and others, received goods from B. to sell, under an agreement to account for and make returns of the sales. In making returns he failed to state a large sale for cash—*Held*, that if such false return to B. was made with the intent to defraud his creditors, it would sustain an allegation in an affidavit for an attachment that “he had fraudulently concealed,” &c., his property. (See R. S. 1845, 133, § 1.) *Powell v. Matthews*, x. 49.

2. The husband may have a legal right to money with which his wife secures a conveyance to her own separate use, and yet not be guilty of such fraud in relation to his creditors as is contemplated by the law of attachments, in tacitly leaving it entirely to her own disposition and control. *Beach v. Baldwin*, xiv. 597.

3. Every casual and temporary absence of a debtor from his usual place of abode, is not a legal ground for issuing an attachment against his property; it must be

such as to prevent the service of ordinary process upon him. When, therefore, a summons, issued upon the day the attachment issued, can be served upon the defendant a sufficient time before the return day, to give the plaintiff all the rights which he could have at the return term, the defendant has not absented himself as that the ordinary process of law cannot be served upon him. *Kingsland v. Worsham*, xv. 657. *Ellington v. Moore*, xvii. 424.

4. It is a fraudulent disposition of property within the meaning of the statute relating to attachments, for a debtor to confess judgment in favor of one creditor with intent to hinder or delay his other creditors. If the judgment creditor directs the sheriff to hold up his execution, and not to sell nor proceed to make the money until he shall give further orders, and until he shall find younger executions crowding in, such act renders the execution dormant and fraudulent as to subsequent executions. *Field v. Liverman*, xvii. 218.

5. An express company received goods from a vendor to be transported and delivered to the vendee upon payment of the price. The goods were delivered to the vendee by the company without the payment of the price, the company thereby becoming liable to the vendor—*Held*, that the company could not maintain an attachment against the vendee under the statute. (R. S. 1855, 238, § 1, cl. 13.) *Richardson's Express v. Cunningham*, xxv. 396.

II. AFFIDAVIT.

6. An affidavit taken before any judicial officer of another State, who, according to the course of the common law and the practice of courts, is authorized to administer oaths, is good here for the purpose of holding to bail, or of granting an attachment; and the official character of a judge in another State is sufficiently proved by a certificate of the Clerk of the Court, under the seal of the court. *Hays v. Bouthalier*, i. 346.

7. Thus the affidavit may be made before a Justice of another State, and the certificate of the Clerk of the County Court where he resides, is sufficient evidence of his official character, and the certificate of two Commissioners of the same county that the person certifying is the Clerk, etc., is sufficient as to that. *Posey v. Buckner*, iii. 604.

8. Under a statute authorizing an attachment to issue upon a party swearing that "he verily believes that the defendant is not a resident of or residing within this State, or that he has so absented himself, or absconded from his usual place of abode, or concealed, or confined himself, that the ordinary process of law cannot be served upon him, or that he is about to remove his effects out of this State"—*Held*, that an affidavit that the defendant "is not a resident of this State, so that the process cannot be served upon him," is not conformable to the statute, not bringing the defendant within either of the classes therein designated. *Lane v. Fellows*, i. 353.

9. Nor is an affidavit that the defendant "verily believes that the said defendant is not a resident of this State," conformable to such statute. *Alexander v. Haden*, ii. 228.

10. Where an affidavit for an attachment filed with a Justice is defective, it may be amended in the Circuit Court, on application for that purpose. *Hackney v. Williams*, iii. 455.

11. An affidavit for an attachment under the statute (R. S. 1835, 76, § 1, cl. 4) must state that the affiant has "good reason to believe that the defendant is about fraudulently to remove, convey or dispose of his property," &c., it is not sufficient to say that "it is the belief," &c. *Stevenson v. Robbins*, v. 18.

12. Under the statute (Acts 1838-9, 6, § 1) an affidavit for an attachment which alleges that the "affiant has good reason to believe, and does believe, that the defendant is about to convey his property, so as to hinder or delay his creditors," following the words of the statute, is sufficient. *Curtis v. Settle*, vii. 452.

13. It is sufficient in an affidavit for an attachment to state that the defendant "is indebted," etc., omitting the word "justly." (See R. S. 1845, 134, § 3.) *Livengood v. Shaw*, x. 273.

14. It is no ground of demurrer to a petition in an attachment suit founded upon a note not matured, that it states the note to be "due," or that it fails to refer to the law, or to state the existence of the facts, which authorize an attachment under such circumstances. It is sufficient that the affidavit sets forth facts which constitute a cause of action. *Kritzer v. Smith*, xxi. 296.

III. BOND.

a. ATTACHMENT BOND.

15. Where the penal sum named in an attachment bond was "two thousand," and it appeared from its condition that it was taken to secure the forthcoming of property of the value of "one thousand dollars"—*Held*, that it would be intended that the penal sum was designed to be expressed in "dollars." (See 8 Barn. & Cress. 568.) *Grant v. Brotherton*, vii. 458.

16. The bond required by the act of 1837, (Acts 1836-7, 8, § 1,) must be filed before the attachment issues, and the omission to do so is a fatal defect that cannot be cured by a subsequent filing of a bond. *Stevenson v. Robbins*, v. 18.

17. A subsequent attaching creditor cannot take advantage of a defect in the attachment bond given by a prior attaching creditor. *Van Arsdale v. Krum*, ix. 393.

18. Under the statute of 1839, (Acts 1838-9, 7, § 13,) the court may, on motion, give leave to amend an attachment bond, whatever be the defect. *Ibid*.

19. A suit by attachment ought not to be dismissed for any insufficiency in the bond, until the court has given time, and the plaintiff has failed to file a new bond. *Tevis v. Hughes*, x. 380.

20. Where a defendant, who had a verdict on a plea in abatement to the affidavit in attachment, brings suit on the bond, alleging a failure to prosecute with effect, the truth of the affidavit in the attachment cannot be inquired into. *Hayden v. Sample*, x. 215.

21. A bond executed under the statute relating to attachments, (R. S. 1845, 135, § 4,) which omits part of the conditions specified in the act, is nevertheless valid as to the conditions contained in it. *The State v. Berry*, xii. 376.

22. A. commenced an attachment suit against B. in the United States Circuit Court, and thereupon executed a bond to B., conditioned that A. should prosecute his suit with effect, and should pay all damages that might accrue to B., or to any garnishee in consequence of said attachment—*Held*, that upon a breach of the condition, B. may maintain a suit thereon to the use of any garnishee who has been damaged ;—that the bond, although voluntary and not authorized by any statute, is good as a common law bond ; and that a bond with a like condition, made to the United States is valid, although not executed in pursuance of any law, nor in connection with any business of the United States, nor any duty of the obligor to them, and that a garnishee may sue on such bond, in the name of the United States, to his use. *Barnes v. Webster*, xvi. 258. *United States v. Ferguson*, xvi. 258.

b. DELIVERY BOND.

23. Under a statute that required the plaintiff, before order for sale of attached property, to give bond for the return of the goods or effects, if defendant shall disprove, avoid or discharge the debt within one year next following, (1 Ter. L. 146, § 4,) —*Held*, in a case where the bond given was conditioned for the return to defendant of the “goods and chattels,” that lands are to be considered as chattels in the payment of debts, and that such a bond includes them. *Hays v. Bouthalier*, i. 346.

24. Where the defendant in an attachment executes a bond as provided in the act of January 17, 1831, (2 Ter. L. 248, § 2,) he thereby waives all objection to the attachment and to the proceedings taken under it. *Payne v. Snell*, iii. 409.

25. Where a statute provides for the taking of a bond, but does not prescribe its form, it is sufficient to take a bond which would be good between the parties at common law. (See Acts 1836–7, 8, § 2.) *Grant v. Brotherton*, vii. 458.

26. Where property in the hands of a third person is attached, and is retained by giving a bond to the Sheriff for its delivery “when and where the court shall direct,” according to the statute (R. S. 1835, 78, § 14) an order of court for its delivery is necessary to render the obligors liable on the bond. The judgment of the court against the defendant in the attachment suit, and an execution issued to the sheriff, is not sufficient to fix the liability of the obligors. *Brotherton v. Thomson*, xi. 94.

27. R., as the security of S., entered into a bond to the Sheriff in the penal sum of thirteen dollars, conditioned for the return of property taken on attachment against S., stated in the condition to be worth seven hundred dollars. The Circuit Court under the statute relating to attachments (Acts 1840–1, 15) rendered judgment against R., on the bond for six hundred and sixty-two dollars—*Held*, that it was error to render judgment for a sum larger than that stated in the penal part of the bond, since the word “hundred,” supposed to be omitted in stating the penalty, could not be supplied by construction. *Rayburn v. Deaver*, viii. 104.

28. The act of February 15, 1841, (Acts 1840–1, 15,) which provides that

judgment may be rendered, in certain cases, against the principal and sureties in the bond given to retain the possession of property attached, is prospective, and applies only to bonds executed after its passage. *Thompson v. Smith*, viii. 723.

C. BOND GIVEN ON DISSOLUTION OF AN ATTACHMENT.

29. In an action on a bond given to dissolve an attachment, a notice of special matter under the plea of *non est factum*, alleging "that the appeal had been taken to the Supreme Court and allowed," is insufficient. It should allege that "the appeal was pending and undetermined." *Poteet v. Boyd*, x. 160.

D. DAMAGES.

30. An attachment bond conditioned "to pay all damages which may accrue to the defendant in consequence of the attachment," will extend to damages occasioned by any proceeding in the suit, and to costs and expenses attending the trial of a plea in abatement to the affidavit. *Hayden v. Sample*, x. 215.

31. And such bond given under the statute (R. S. 1845, 135, § 4) will extend to damages naturally and proximately resulting from the attachment, and damages for injuries to credit and business can only be recovered in an action on the case for maliciously suing out an attachment. *The State v. Thomas*, xix. 613.

IV. PARTIES.

32. The remedy by attachment is not confined to resident creditors, but is open to non-residents. *Graham v. Bradbury*, vii. 281.

33. And a non-resident may have an attachment against a non-resident. *Posey v. Buckner*, iii. 604.

34. A foreign corporation may be sued by attachment in the courts of this State. *Perpetual Insurance Co. v. Cohen*, ix. 416.

V. WHAT IS ATTACHABLE.

35 The individual interest of a joint payee of a note or of an order, may be attached by garnishment of the payor; but whenever a joint payee has received his proportionate share of the debt, he has no longer any interest in it that can be attached. *Miller v. Richardson*, i. 310.

36. A trust estate can never be attached for the debts of the trustee. *Ibid.*

37. A. was indebted to B., and consigned to him a quantity of goods, with directions to sell them and apply the proceeds to the payment of the indebtedness. The goods were attached while *in transitu*. On receiving notice of the shipment, B. insured the goods on his own account, but it did not appear that he did so prior to the attachment—*Held*, that the property in the goods remained in the consignor; that they were at his risk, and were subject to attachment by his creditors. *Sproule v. McNulty*, vii. 62.

38. An attachment will lie against the property of one of two joint contractors, on the ground of his non-residence, although the other contractor is a resident of the State. *Searcy v. Platte County*, x. 269.

39. A. having rented land for a year, gave leave to B. to sow part of it with grain. B. afterwards abandoned the crop, which was reaped by A., after he had received his lease for a second year—*Held*, that the grain was not liable to attachment as property of B. *Hall v. Shannon*, xix. 401.

40. A promissory note assigned to a wife, during coverture, is subject to attachment for the debt of the husband. *Hockaday v. Sallee*, xxvi. 219.

VI. PROCESS.

a. THE WRIT.

41. A writ of attachment commanded the Sheriff to attach the defendant by his lands, &c., to be and appear to answer, &c., without any clause of summons, and there was no return by the Sheriff of service of a summons. The attachment was dissolved—*Held*, that the suit was properly dismissed for want of a summons. *Bland v. Schott*, v. 213.

42. The form of notice of an attachment suit, which has been usually adopted in the courts of this State, although it does not specify "the nature of the demand," is sufficient, it having been the long-continued practice of the courts *Sloan v. Forse*, xi. 126.

43. It is not necessary that the name of every person summoned as garnishee in an attachment suit should be inserted in the writ. *Briggs v. Block*, xviii. 281.

44. Where a writ of attachment is made returnable to the wrong term,—as when, within fifteen days of the commencement of the term, the party against whom the writ issues is summoned to appear at such term,—it is not thereby rendered a nullity. *RICHARDSON, J., dis. Bank of Missouri v. Matson*, xxvi. 243.

b. SERVICE.

45. Where, in a suit by attachment, a defendant is not served with process, and does not appear, the judgment upon publication of notice is special, and does not authorize an execution against any property but that attached. *Clark v. Holliday*, ix. 702.

46. Where the defendant in an attachment suit, upon whom there had been a defective service, appears in court, and moves to quash the return of the Sheriff and the writ, it is error to dismiss the suit. *Withers v. Rodgers*, xxiv. 340.

47. The attachment law of 1845, and not the new code, governs as to the publication of notice to non-resident defendants in attachment suits. *Gates v. Clavadetscher*, xix. 125.

c. LEVY.

48. As to the requisites of a levy of a writ of attachment. *Prima facie*, it

should be presumed that a writ of attachment was levied as early as the date under which the return is made. *Lackey v. Seibert*, xxiii. 85.

d. RETURN.

49. A return of an attachment of land, precise as to quantity, and as particular as deeds generally are, as to the location and boundaries, is a sufficient return. *Hays v. Bouthalier*, i. 346.

50. The sale of attached property by the Sheriff under an order of the circuit judge in vacation, *prima facie* passes the title to the property to the purchaser, although the Sheriff's return in the attachment suit is insufficient. *Chambers v. Kelly*, xii. 514.

51. And where there has been a personal service of a writ of attachment upon the defendant, the attachment will not be defeated as against subsequent purchasers, by a failure of the officer making return to state in his return the fact that notice of the attachment has been given to the actual tenants, and the names of the tenants. *Lackey v. Seibert*, xxiii. 85.

52. In an attachment suit, the return of the Sheriff constitutes a part of the record, and error may be assigned on it. *Walsh v. Agnew*, xii. 520.

VII. PLEA IN ABATEMENT.

53. A plea in abatement, under the act of 1837, (Acts 1836-7, 9, § 5,) amendatory of the attachment law, puts in issue only the truth of the facts asserted in the affidavit, and not the affiant's belief of them. *Chenault v. Chapron*, v. 438. *Dider v. Courtney*, vii. 500.

54. A misnomer cannot be taken advantage of under that plea. *Swan v. O'Fallon*, vii. 231.

55. And it is error for the court, on such plea, to dismiss the attachment, and then proceed to a trial on the merits, where the defendant objects. The issue on abatement being found against the plaintiff, the suit should be dismissed. *Mense v. Osborn*, v. 544.

56. Where the truth of the facts upon which the attachment is issued are controverted, it must be done by a plea in the nature of a plea in abatement. (See Acts 1838-9, 7, § 11.) *Graham v. Bradbury*, vii. 281.

57. And cannot be done on motion. *Searcy v. Platte County*, x. 269.

58. An affidavit for an attachment alleged "that the defendant had absconded or absented himself from his usual place of abode in this State, so that the ordinary process of law could not be served upon him." Under a plea in abatement, the only issue to be tried by a jury is the fact whether the party so absconded or absented himself as to prevent the service of a writ. The intention of the party is not in issue. *Temple v. Cochran*, xiii. 116.

59. The defendant should be permitted to amend a clerical error in his plea traversing the affidavit upon which an attachment was issued, even after demurrer sustained. [OVERRULING *Livengood v. Shaw*, x. 273.] *Cayce v. Ragsdale*, xvii. 32.

60. And the plaintiff may amend the petition, bond and affidavit, wherein the Christian name of the defendant is incorrectly stated. *Middleton v. Frame*, xxi. 412.

61. The plea authorized by the statute (R. S. 1845, 139, § 25) is a plea in abatement, and is waived by pleading to the merits of the action. *Hatry v. Skuman*, xiii. 547.

62. Under the new code, a defendant in an attachment suit cannot, in the same answer, plead in abatement to the truth of the affidavit, and in bar to the merits of the action. By so doing, he waives the plea in abatement. *Cannon v. McManus*, xvii. 345.

63. Suit was commenced, by attachment, on a note given by A. & Co., before a Justice, against A. and B. The affidavit alleged that A. and B., composing the firm of A. & Co., were non-residents. The firm of A. & Co. was in fact composed of A. and C. On appeal to the Circuit Court, the suit was dismissed as to B. A plea was filed denying the non-residence of A.—*Held*, that the only issue to be tried was whether A. was a non-resident. *Moore v. Otis*, xx. 153.

VIII. EVIDENCE.

64. Where an attachment is issued on an affidavit that the defendant is about to remove his property out of the State, in order to hinder and delay creditors, and there is a plea in abatement to the affidavit, evidence of the indebtedness of the defendant, to the plaintiff or others, is not admissible on the trial of that plea. *Switzer v. Carson*, ix. 732.

65. In an attachment, where the evidence for the plaintiff on a plea in abatement, is confined to the issue that the defendant was about to remove his property out of the State, with the intent to defraud his creditors, and the *bona fides* of debts, alleged to have been paid by the defendant, is not questioned, no rebutting testimony, showing that they were justly due, is necessary. *Crow v. Marshall*, xv. 499.

66. In a suit on an account commenced by attachment, with allegations of fraudulent concealment or disposition of property, considerable latitude is allowed in the introduction of evidence of the fraud; and in order to show that a judgment confessed by defendant in favor of one of his creditors, and a stay of proceedings thereon by order of said creditor were in fraud of other creditors, conversations between the witness and such judgment creditor may be introduced. *Field v. Liverman*, xvii. 218.

See FRAUD, I; . . . FRAUDULENT CONVEYANCES, IV.

IX. PLEADING AND PRACTICE.

67. An attachment may be quashed when issued upon a state of facts which do not justify the issuing of the writ. *Per* SCOTT, J. *Graham v. Bradbury*, vii. 281.

68. Where a judgment by default is rendered in an attachment suit on publication of notice, it should be set aside on the application of defendant before the damages are assessed, upon proper terms. *Sloan v. Forse*, xi. 126.

69. Where a party has filed an interplea in an attachment suit, and taken a non-suit on the trial, it is no error for the court to strike out a second interplea filed by him in the same case, without leave of court. *Keiser v. Moore*, xvi. 179.

70. In an attachment suit submitted to the court sitting as a jury upon the claim of an interpleader, the court should peruse the provisions of the new code in finding the facts and pronouncing the law thereon. (Art. xv. § 2.) *Skinner v. Thompson*, xix. 528.

71. The trustee in a deed of trust upon a stock of goods seized in an attachment suit, may interplead for the goods or their proceeds, although he has sold under the deed of trust since the sale under the attachment. *Same Case*, xxi. 15.

72. Where issue was taken on only two of three alleged causes for suing out a writ of attachment, and a general verdict was given for the plaintiff, it was held, that there was no error, as either of the two causes on which issue was taken was sufficient to support the attachment. *Kritzer v. Smith*, xxi. 296.

73. The issue being, whether a party was "about fraudulently to conceal or dispose of his property or effects so as to hinder or delay his creditors," an instruction that he must have done some act to indicate the intent, was properly refused, an instruction having been given in the words of the statutes. *Ibid.*

74. In an attachment suit on a note not yet due, it seems, the defendant is not bound to plead to the action until the note has matured. *Ibid.*

75. An interplea can be resorted to in an attachment suit only where personal property is attached. *Gordon v. McCurdy*, xxvi. 304.

See PRACTICE, 9, 10, 16, 17.

X. LIEN.

76. Where the property of the defendant is attached in the hands of a third person, and is retained by giving a bond and security for the forthcoming of the same, the attachment continues a lien on the property. (R. S. 1835, 78, § 14.) *Evans v. King*, vii. 411.

77. The lien of an attachment is lost by the death of the debtor after service of process, but before judgment. *Per* TOMPKINS, J. SCOTT, J., declined to give an opinion on this point. NAPTON, J., absent. *Sweringen v. Eberius*, vii. 421.

78. And where the death of the debtor occurred after execution issued, but before the sale, the lien is lost. *Prewitt v. Jewell*, ix. 723. *Miller v. Doan*, xix. 650.

79. As, also, where the death of the debtor took place after judgment, without personal service, the lien of the attachment is lost. And such judgment cannot be made the basis of a proceeding in the Court of Probate jurisdiction. *Harrison v. Renfro*, xiii. 446.

80. An execution is placed in the hands of a constable; after it is received, but before it is levied, an attachment is issued and levied by the sheriff upon the

goods of the defendant in the execution—*Held*, that the attachment will hold against the execution. *Scott, J., dis. Field v. Milburn*, ix. 488.

81. The levy of a writ of attachment upon land creates a lien from the moment of the levy. A sale, under an execution issued upon the judgment against the defendant in the attachment, relates back to the time of the levy, and passes the title to the purchaser, unaffected by any incumbrances created or conveyances made subsequently to such levy. *Lackey v. Seibert*, xxiii. 85.

XI. JUDGMENT.

82. Prior to 1824, suit could not be instituted *in personam* against one of several defendants, and, *in rem*, against the others. In such a case, where all the defendants appear, it is error to render judgment against the one served with process, and taking no steps as to the others. *Hempstead v. Dodge*, i. 493.

83. A judgment rendered in an attachment suit on a defective affidavit, by the creditor suing out the attachment, will be set aside for irregularity after the lapse of three terms of the court. *Alexander v. Haden*, ii. 228.

84. Where, in an attachment suit in which the defendant is notified by publication and does not appear and answer, judgment by default is rendered against him, such judgment will bind only the property attached. (R. S. '55, 250, §§ 43, 44.) *Johnson v. Holley*, xxvii. 594.

85. A judgment in an attachment suit in the following form, "it is, therefore, considered by the court, that the said plaintiffs recover of the said defendant the sum of \$368.50, as and for their demand, and, also, their costs and charges herein expended, and that they have a special execution on the property attached, to-wit, lot No. 9," &c., is in substantial compliance with the statutory provisions. *Ibid*.

XII. IN AID OF OTHER ACTIONS.

86. An attachment may issue upon a statement in the form of a "petition in debt," as in other actions. *Chenault v. Chapron*, v. 438.

87. Under the statute, (R. S. 1845, 132,) an attachment cannot issue in an action *ex delicto*, but only in actions *ex contractu*. *McDonald v. Forsyth*, xiii. 549.

XIII. TRIAL OF THE RIGHT OF PROPERTY.

88. A constable has no authority, under the statute, (R. S. 1835, 367, § 14,) to summon a jury to try the right to property taken on an attachment, and he is liable if he parts with the property under an illegal proceeding. *Little v. Seymour*, vi. 166.

See EXECUTION, VIII.

XIV. SALE.

89. Where, in an attachment suit, the judgment rendered is a general one, the court has no right to order that the property attached shall be sold rather than any other, or to specify any property whatever. *Kritzer v. Smith*, xxi. 296.

90. A Justice ordered the sale of a wood boat in the custody of the constable, under a writ of attachment—*Held*, that on a final determination of the attachment suit in favor of the defendant, that he would be entitled to the entire proceeds of the sale of the boat, and might recover the same from the constable, and that any trouble or expense in keeping the boat should be taxed as cost in the cause against the unsuccessful party; the constable would not have a lien on the proceeds of the sale of the boat for the expense of keeping and selling it. *Snead v. Wegman*, xxvii. 176.

91. And as only the defendant's interest in the boat could be attached and sold, he alone could sue the constable for the proceeds of the sale. A joint owner with him could not join in such action. *Ibid*.

See COSTS, 29;....ERROR, 20;....JURISDICTION, 67;....LIEN, 16;....SHERIFF, 10;....TRESSPASS, 12, 17.

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ATTORNEY AT LAW.

I. POWER.

II. LIABILITY.

III. INDICTMENT FOR PRACTICING WITHOUT LICENSE.

IV. AUTHORITY FOR APPEARING.

V. SUSPENSION FROM PRACTICE.

VI. FEES AND LIEN THEREFOR.

I. POWER.

1. An attorney at law entrusted with the management of an execution cannot release or discharge a garnishee from answering, without special authority, express or implied, from his clients. *Quarles v. Porter*, xii. 76.

2. Nor can he enter into a compromise, binding upon his clients, without such special authority. *Davidson v. Rozier*, xxiii. 387.

II. LIABILITY.

3. An attorney is not liable for neglect unless his client furnishes him with instructions sufficient to enable him to act in the prosecution or defense of a suit. *Benton v. Craig*, ii. 198.

4. If money is advanced to an attorney for services to be performed at a future

day, a right of action to recover it back accrues from the time he neglects to perform the services. *Ibid.*

5. Where an attorney purchases in, for his own benefit, a title adverse to that of his client, he is not liable to an action in favor of a subsequent grantee of his client. *Cowan v. Barret*, xviii. 257.

III. INDICTMENT FOR PRACTICING WITHOUT LICENSE.

6. If an indictment founded upon the statute imposing a tax upon lawyers, (Acts 1846-7, 124, §§ 7, 8,) follows the words of the statute in its description of the offense charged, it is sufficient. *Simmons v. The State*, xii. 268. *The State v. Hereford*, xiii. 3. See LAWS, 21.

IV. AUTHORITY FOR APPEARING.

7. An attorney will be required to show upon what authority he appears for a party, upon sufficient cause being shown. *Keith v. Wilson*, vi. 435.

8. And it is for the court to determine whether an attorney has authority to appear in court or not. *Clark v. Holliday*, ix. 702.

V. SUSPENSION FROM PRACTICE.

9. Under the act which provided that the Circuit Court "shall have power to suspend from practice any attorney guilty of misconduct, which in the opinion of the court is such as to justify his being stricken from the rolls," (R. S. 1825, 159, § 7,) the Circuit Court had no power to suspend an attorney for a period of six months. The suspension should have been indefinite. *Sirother v. The State*, i. 605.

10. And in order that the suspension shall be valid, it must appear that the misconduct of the attorney was such, in the opinion of the court, as to justify his being stricken from the rolls. *Ibid.*

11. An order suspending an attorney from practice must state the cause of suspension and allege the precise ground upon which it is made. *The State v. Watkins*, iii. 480.

12. An attorney cannot be suspended from practice because it is proven to the court that he had passed counterfeit notes, knowing them to be such, and that being confined in jail, he escaped therefrom. (See R. S. 1825, 159, § 6.) *The State v. Foreman*, iii. 602.

VI. FEES AND LIEN THEREFOR.

13. In an action by an attorney to recover his fee, a letter signed by the defendant, and in the possession of the plaintiff, although not directed to any one, by

which the defendant promised to pay a certain sum, was held admissible in evidence for the plaintiff, it being shown that the plaintiff had before offered to undertake the case for that sum. *Bogliolo v. Scott*, v. 341.

14. A written agreement by an agent, within the scope of his authority, employing attorneys at a stipulated price to prosecute suits for his principals, is admissible evidence to prove the value of the services rendered. *Webb v. Browning*, xiv. 354.

15. An attorney has no lien for his fee upon a judgment recovered by him. The defendant will be protected in paying the money to the plaintiff in the judgment, notwithstanding he may have notice that the fee of the attorney is unpaid. *Frissell v. Haile*, xviii. 18. See MASTER AND SLAVE, 4; . . . SUPRA, 4.

See ADMINISTRATION, 16; . . . ERROR, 13; . . . ST. LOUIS, II; . . . WITNESS, 59.

AUCTIONEERS.

I. LICENSE.

II. CANNOT DELEGATE AUTHORITY.

III. LIEN.

IV. ACTION AGAINST.

V. INDICTMENT.

I. LICENSE.

1. Where a law of the State required that an auctioneer's license should be obtained from the State, (1 Ter. L. 693,) and the charter of a city authorized the city authorities "to provide for licensing, taxing and regulating auctions," &c., (1 Ter. L. 969, § 12,) a license obtained from the city will not dispense with the necessity for obtaining also a State license. *Simpson v. Savage*, i. 359.

II. CANNOT DELEGATE AUTHORITY.

2. An auctioneer cannot delegate to another his authority to sell. *Stone v. The State*, xii. 400.

III. LIEN.

3. An auctioneer, to whom commissions are due, has a right to appropriate so much of the money arising from the sales as may be due to him for his commissions, to the payment of his individual debts to a purchaser. *Harlow v. Sparr*, xv. 184.

IV. ACTION AGAINST.

4. The plaintiff delivered a slave to an auctioneer to sell, which was sold accordingly. In an action for the proceeds of the sale, the plaintiff must show a general or special property in the slave to entitle him to a recovery. It is not sufficient to show merely that he delivered him to the auctioneer. *Allen v. Brown*, v. 323

V. INDICTMENT.

5. An indictment, charging that the "defendant did exercise the business of a public auctioneer," pursues the essential descriptive words of the statute, (R. S. 1825, 161, § 2,) and is good. *Vaughn v. The State*, iv. 530.

6. It is error to charge two persons with jointly exercising the trade of an auctioneer. *Ibid.*

7. A person may be guilty of exercising the trade or business of a public auctioneer without a license, although he receives no compensation for the act of selling. *The State v. Rucker*, xxiv. 557.

8. Tobacco, the growth of this State, is not exempt from duty under the statute to license auctioneers, (R. S. 1845, 164, § 15, cl. 7.) *Ibid.*

B A I L.

1. Bail can surrender the principal after a *scire facias* has issued, and at any time before the *scire facias* is returned executed. *Hood v. Creath*, i. 582.

2. Under proceedings by attachment, the plaintiff, by agreement with the defendant, may dispense with bail on the appearance of the defendant. *McNair v. Lane*, ii. 57.

3. The Circuit Court has no power to quash a writ and dismiss the suit, because bail was improperly required, in an action commenced by *capias*. (See R. S. 1835, 453, § 3.) *Lyon v. Harlow*, vii. 345.

4. An action of debt lies on a bail bond given to a sheriff, and is properly brought in his name. *Parmer v. Moore*, i. 176.

5. A bail bond may be assigned by the sheriff to the party in interest, or suit may be brought on it by the sheriff to the use of such party. *Howel v. March*, i. 182. *Priest v. Whitelaw*, i. 259. *Benton v. Brown*, i. 393.

6. Where an action is brought on a bail bond—*Held*, that the bail cannot exonerate himself by surrendering his principal at a term subsequent to the return of the writ, and after judgment on the bail bond, a stay of proceedings, on account of such surrender, is improper. *Parmer v. Moore*, i. 706.

See CRIMINAL LAW, III.

BAILMENT.

- I. HIRING—WAREHOUSEMAN.
- II. DEPOSIT.
- III. NEGLIGENCE.
- IV. AGISTER.
- V. ACTION AGAINST BAILEE.
- VI. PAWN OR PLEDGE.
- VII. GRATUITOUS LOAN.

I. HIRING—WAREHOUSEMAN.

1. A receipt given for a keel boat, describing it as in good order at the time, and containing a promise by the receptor to return it in like condition, covers all but secret defects in the boat. *Bates v. Simmons*, iii. 267.

2. A warehouseman is only held to the exercise of ordinary diligence in securing property intrusted to his care. *Ducker v. Barnett*, v. 97.

3. The liability of warehousemen and forwarding agents is different from that of common carriers; they are responsible only for losses occasioned by their fault or negligence. Where a common carrier engages to carry goods to a certain point, the terminus of the road, and there to deliver them on board a steamboat, the liability of a common carrier continues only until the arrival of the goods at the terminus of the road, and the liability of a warehouseman and forwarding agent then commences; if the goods are damaged while deposited on the levee awaiting the arrival of a steamboat, the owner can recover only for loss occasioned by negligence. *Holtzclaw v. Duff*, xxvii. 392.

4. Where the bailee of a slave for hire at an agreed price, agrees to return the slave at a given time, but fails to do so in consequence of the escape of the slave, without any neglect or fault on the part of the bailee, he is liable for the hire, but not for the value of the slave. *Ellett v. Bobb*, vi. 323. *Perkins v. Reeds*, viii. 33.

5. The hirer of a slave is not responsible for his running away, unless it be by some fault of his, and this must be shown by the plaintiff. The degree of care to be taken by the hirer to prevent an escape, and the efforts which he is bound to make to effect a recapture, depend upon the nature of the service in which the slave is engaged, and the circumstances attending the escape as well as the character of the hiring. [*Ellett v. Bobb*, vi. 323. *Perkins v. Reeds*, viii. 33, commented upon and approved.] *Perry v. Beardslee*, x. 568. *Beardslee v. Perry*, xiv. 88.

6. Where a party hired a slave for a year, and then hired him out to another, who, by his cruelty, caused his death, the owner or original hirer may maintain an action for the recovery of the value of the slave. *Adams v. Childers*, x. 778.

7. An agreement of a bailee for hire to return the chattel in good order is excused, if, without fault of his, it is destroyed by an irresistible force; as when a barge was destroyed by ice on the Mississippi. *Scott, J., dis. McEvers v. St. Bt. Sangamon*, xxii. 187.

II. DEPOSIT.

8. B. deposited with P. four hundred dollars, to be applied in the purchase of wheat at a given price; but P., finding that he could not procure the wheat at the price named, deposited the money with one F. for safe keeping, subject to B.'s order, and gave B. notice thereof. Subsequently the money was stolen from F.—*Held*, that P. was not liable for it, and that the facts stated might be given in evidence by him under the general issue in *assumpsit*. *McGirk, J. dis. Benson v. Peebles*, v. 132.

III. NEGLIGENCE.

9. A stable keeper, having in charge a horse to keep for pay, is not liable if the horse escape and is lost, without any negligence on the part of the keeper. *Owens v. Geiger*, ii. 39.

10. Where a party undertakes, without reward, to dispose of the property of another in the same manner as though it were his own, he is liable only for gross negligence, and is not held to the rule of ordinary diligence. *McLean v. Rutherford*, viii. 109.

11. Where, under such a contract, the bailee undertakes to dispose of the horses of another in a distant market, and is taken ill on the way and unable to pursue his journey, he may employ an agent to take his place and dispose of the property, and does not thereby incur any additional responsibility. *Ibid*.

12. A bailee, who has charge of a boat for the purpose of repairing it, is bound to use ordinary care and diligence in its preservation, and is liable for all damages which may result to it in consequence of his negligence or want of care. *Smith v. Meegan*, xxii. 150.

IV. AGISTER.

13. An agister of cattle is not rendered liable for the loss of a horse committed to his charge, upon the mere proof of the loss; negligence must be shown. *Rey v. Toney*, xxiv. 600.

V. ACTION AGAINST BAILEE.

14. A petition, alleging that the plaintiff delivered a slave belonging to him to the defendant for safe keeping, for which he agreed to pay a certain sum per day, that said slave had never been delivered by defendant to plaintiff, although plaintiff had demanded said slave from him, is defective in not alleging a contract to re-deliver, nor a conversion of the slave by defendant, nor a loss through the negligence of defendant. *Andrews v. Lynch*, xxvii. 167.

VI. PAWN, OR PLEDGE.

15. When no time is mentioned, the pawnor has his lifetime to redeem in, unless the pawnee hasten the time by request. If, after request by the pawnee,

the pawnor neglect to redeem in a reasonable time, the pawnee may sell the pledge. *Perry v. Craig*, iii. 516.

VII. GRATUITOUS LOAN.

16. To authorize the lender of a chattel to recover its value of the borrower, it must appear that it has been lost or destroyed through the negligence of the latter, or has been converted to his use; there can be no recovery as for a conversion of the chattel, where the evidence merely shows that there was a loan and a failure on the part of the borrower to return the thing borrowed; a demand must be shown. *Ross v. Clark*, xxvii. 549.

See BOATS AND VESSELS, X.

BANKING.

- I. INDICTMENT FOR ILLEGAL BANKING.
- II. CERTIFICATE OF DEPOSIT.
- III. CHECKS ON BANKS AND BANKERS.
- IV. BANK OF MISSOURI.
- V. BANK OF EDWARDSVILLE.

I. INDICTMENT FOR ILLEGAL BANKING.

1. An indictment describing a note as purporting to be payable to the holder, when, on the face of it, it purports to be payable to the bearer, is bad. *Downing v. The State*, iv. 572.

2. On an indictment against D., founded on the statute for the suppression of private bank notes, (R. S. 1835, 96,) it was proved that he was Secretary or Cashier of a certain private banking establishment, and resided in Wisconsin, and signed the notes of the establishment as such Cashier; that the President, whose signature was also attached to the notes, resided in St. Louis and kept a broker's office there; that the President had exchanged two of said notes on an Illinois bank, at the request of the witness; that said notes were seen in circulation in the city of St. Louis, and had been redeemed at the office of the President; that D. had been seen in St. Louis only once, when he made some inquiries as to his liability on said notes—*Held*, that there was no evidence of a circulation of the notes by D. *Ibid*.

3. An indictment for a violation of the statute, (R. S. 1845, 167, § 4,) which describes the offense in the words of the act, is good, and several persons may be joined as defendants in the same indictment. *The State v. Presbury*, xiii. 342.

4. Where such an indictment describes the offense in the words of the act, a general conviction or acquittal is a bar to a subsequent indictment for a similar offense during the period covered by the terms and intendments of the former indictment. *Ibid.*

5. Where an indictment, framed under the statute, (R. S. 1845, 166,) charges defendant with making or putting in circulation a note, &c., purporting that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts, the indictment can only be sustained by the production and giving in evidence of a note, &c., which, upon its own face, declares that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts. SCOTT, J., *dis.* [*Downing v. The State*, iv. 572, referred to and concurred in.] *The State v. Page*, xix. 213.

6. The last clause of § 1 of the statute, (R. S. 1845, 167,) is entirely distinct from those clauses to which the word "purporting" applies, and embraces all cases in which any person creates or puts in circulation, as a circulating medium, any note, bill, &c., to be used as a currency or medium of trade in lieu of money, whatever may be its purport. SCOTT, J., *dis.* *Ibid.*

II. CERTIFICATE OF DEPOSIT.

7. A certificate of deposit to "S. B. K., Cashier," for funds deposited which belonged to the bank of which he was Cashier, may be transferred by him, and the innocent holder will be protected, although the transfer was in bad faith on the part of the Cashier. *Perpetual Ins. Co. v. Cohen*, ix. 416.

8. Where, in a certificate of deposit, the amount stated in the body of the certificate is different from that in figures in the margin, the former will be taken to be the sum deposited; and if the certificate is declared on for the marginal amount, plaintiff cannot recover, although the defendant in his answer acknowledges his indebtedness for the amount stated in the body. *Payne v. Clark*, xix. 152. See DAMAGES, 14.

III. CHECKS ON BANKS AND BANKERS.

9. The drawing of a check is not a transfer or assignment of the amount for which it was drawn to the holder. *St. John v. Homans*, viii. 382.

10. The holder of a check should use due diligence in presenting the same for payment, and if the drawer sustains any loss or injury from the want of such presentment, he will be discharged. *Ibid.*

11. And, where all the parties to a check are residing in the same city, a delay of eight days in presenting the check is sufficient to discharge the drawer in case of loss. *Ibid.*

12. And it is not necessary, in order to discharge the drawer of a check for want of due presentment, that he should have money in the hands of the drawee

at the time of drawing the check. It is sufficient that he had property or effects in the hands of the drawee. *Ibid.*

13. So a deposit of depreciated bank notes in a bank is sufficient to entitle the drawer of a check to due diligence on the part of the holder in presenting the same. *Ibid.*

IV. BANK OF MISSOURI.

14. The act of Territorial Legislature (1 Ter. L., 532,) "to incorporate the stockholders of the Bank of Missouri," is a public law, although not signed by the President of the Legislative Council, in compliance with a joint rule of the two houses requiring their presiding officers to sign all bills before sent to the Governor for approval. *Douglass v. Bank of Missouri*, i. 24.

15. The Bank of Missouri is authorized, by its charter, (1 Ter. L., 532, §1) to purchase and hold "goods, chattels and effects of whatever kind or nature;" it is therefore competent to take promissory notes by indorsement. *Bank of Missouri*, v. *Price*, i. 54.

16. The act incorporating the Bank of Missouri, (R. S. 1825, 164,) passed January 31, 1817, continued in force till February 1, 1838, and during that period the bank had a legal existence for all the purposes contemplated by the act. *Lindell v. Benton*, vi. 361.

17. The indorsement of a note by an indorsee to the Bank of the State of Missouri, *prima facie* vests the property in the note in the Bank. (See Acts 1836-7, 19, § 29.) *Walker v. Bank of Missouri*, viii. 704.

18. An express demand is necessary to entitle the depositor in the Bank of Missouri to recover twenty per cent. per annum from it for failing to pay a deposit. (See Acts 1836-7, 20, § 35.) *Bank of Missouri* v. *Benoist*, x. 519.

19. As to the liability of the Bank under that section. *Ibid.*

20. The Bank of the State of Missouri established, as required by the act of 1857, (Acts 1856-7, 39, § 12,) a branch at Palmyra, and furnished a capital of \$62,500. Books of subscription were opened at Palmyra, and \$62,500 in stock were subscribed, but only \$33,600 were paid in. The parent bank claimed the right to appoint six of the nine directors, and ordered an election for the three remaining directors. The directors of the branch bank also duly ordered an election to be held for three directors, on the same day, and gave notice to that effect. An election was held and a majority of the stockholders voted for five directors, and a minority voted for three persons as directors. The latter were declared duly elected—*Held*, that the parent bank was authorized by § 15 of chap. 10 of the bank act to appoint six of the nine directors; that not the subscribing of stock merely, but the payment of the same, is a furnishing of capital; and that the election being legally an election for three directors only, the three directors voted for were properly declared elected. *The State* v. *Thompson*, xxvii. 365.

V. BANK OF EDWARDSVILLE.

21. A bank authorized by its charter "to purchase, possess and enjoy lands rents, tenements, hereditaments, goods, chattels and effects of whatsoever kind or quality," to a certain amount, but also restricted from "dealing or trading, except in bills of exchange, gold or silver, or in the sale of goods pledged for money lent, or which shall be the proceeds of its lands," cannot, in the ordinary course of dealing, acquire a right to a promissory note by purchase. *Bank of Edwarsville v. Simpson*, i. 184. *Same v. Hammond*, i. 186.

See ACTION, 81.

BANKRUPTCY.

1. Under the Bankrupt Law of 1841 (5 U.S. Stat. 440,) property acquired by a defendant after his application and before his final discharge, is exempt from liability for debts which were proveable under the act. *Bank of Missouri v. Franciscus*, x. 27.

2. And it is not necessary that the applicant should show in his schedule that his debt was not fiduciary, to entitle him to this exemption, as the law will not presume a breach of trust. *Ibid.*

3. In a bill filed by a bankrupt to enjoin a judgment which had been included in his schedule, it is not necessary to show jurisdiction in the court which granted the discharge. The District Courts of the United States are not courts of inferior jurisdiction, whose judgments, taken alone, are to be disregarded. *Reed v. Vaughn*, x. 447.

4. A discharge under the Bankrupt Act of 1841 (5 U. S. Stat. 440,) releases the bankrupt from all claims or demands against him, due or to become due, contingent or certain. *Shelton v. Pease*, x. 473.

5. And a failure to give notice to a creditor will not vitiate a certificate of discharge under that act. *Ibid.*

6. A transfer of property in contemplation of bankruptcy, to give a preference to a creditor, is a fraud upon the Bankrupt Act, (5 U. S. Stat. 440,) and may be pleaded in bar of a certificate of discharge under it. *Ibid.*

7. And in such plea, it is not necessary to set out the property so conveyed, nor is it necessary to set out the names of the nominal parties to the instrument of conveyance, it is sufficient to set out the names of those beneficially interested. *Ibid.*

8. By the bankrupt law of 1841, (5 U. S. Stat. 442, § 3,) the assignee was substituted to all the rights of the bankrupt. *Benoist v. Darby*, xii. 196.

9. A bankrupt is protected from arrest from the time of filing his application. *The State v. Rollins*, xiii. 179.

10. The certificate of a bankrupt is, of itself, conclusive in his favor, unless

impeached for fraud ; and it cannot, therefore, be impeached by pleading facts showing the non-jurisdiction of the court granting it. *Reed v. Vaughan*, xv. 137.

11. In an action against a bankrupt, on a debt created prior to the bankruptcy, a certificate of discharge is of no avail unless pleaded before judgment rendered. *Bank of Missouri v. Franciscus*, xv. 303.

12. In an action on a judgment of another State—*Held*, that a certificate of discharge in bankruptcy, of an earlier date than the judgment, is no defense. *Rees v. Butler*, xviii. 173.

See INSOLVENTS, 1 ; . . . SET-OFF, 21.

BILLIARD TABLES.

1. Where an indictment under the statute for keeping a billiard table, without a license therefor, describes the offense in the words of the statute, it is sufficient. (R. S. 1845, 171, § 5.) *The State v. Kesslering*, xii. 565.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. FORM—CONSTRUCTION.

- a. BILL.
- b. NOTE.

II. VALIDITY.

- a. ALTERATION.
- b. CANCELLATION.
- c. SPOILIATION AND ALTERATION.

III. PARTIES TO A BILL OR NOTE.

IV. RIGHTS OF HOLDER.

V. RIGHTS AND LIABILITIES OF INDORSERS.

VI. RIGHTS AND LIABILITIES OF INDORSEES.

VII. SURETY.

VIII. ACCEPTANCE.

IX. TRANSFER.

- a. SUBJECT TO EQUITIES.
- b. BLANK INDORSEMENT.
- c. AFTER DUE.
- d. NOTE GIVEN TO OFFICER.
- e. INDORSEMENTS AND THEIR EFFECT.

X. PRESENTMENT.

XI. NOTICE OF DISHONOR.

- a. FORM.
- b. BY WHOM TO BE GIVEN.
- c. SERVICE.
- d. TO WHOM TO BE GIVEN.
- e. BY MAIL.
- f. WAIVER.
- g. SUFFICIENCY.
- h. EVIDENCE.

XII. ACTION ON BILLS AND NOTES.

- a. PLEADING.
- b. PARTIES.
- c. EVIDENCE.
- d. DEFENSE.
- e. NOTES DUE BY INSTALMENTS.

I. FORM.—CONSTRUCTION.

a. BILL.

1. A bill payable in "currency" is not a bill of exchange within the meaning of the statute, and damages are not allowable upon its dishonor. *Farwell v. Kennett*, vii. 595.

2. And the holder of such bill can recover only the specie value of current bank notes for the amount specified therein. *Ibid.*

b. NOTE.

3. A promissory note, which specifies no time of payment, is due from its date. *Mason v. Patton*, i. 279.

4. A note payable "in the current money of Missouri," is payable in gold or silver coin alone. *Cockrill v. Kirkpatrick*, ix. 688.

5. A note payable "in the currency of this State," is payable either in gold or silver coin, or in bank notes, the issuing of which is authorized by the laws of this State. *Ibid.*

6. A covenant to pay a certain sum in current bank notes may be discharged in such notes as are current without discount in ordinary business at the time the debt becomes due; and in an action upon such covenant the plaintiff can recover only the specie value of such bank notes. *Ayres v. Hayes*, xiii. 252.

7. The term "negotiable," in its enlarged signification, applies to any written security which may be transferred by endorsement or delivery, so as to invest in the indorsee the legal title, and a right to maintain thereon a suit in his own name. *Odell v. Gray*, xv. 337.

8. The statute which fixes the rights and liabilities of parties to bonds and ordinary notes where assigned, (R. S. 1845, 189,) does not apply to negotiable notes. These are governed by the general law applicable to bills of exchange. (R. S. 1845, 172.) *Gullett v. Hoy*, xv. 399.

9. In an action on a note, for "the sum of fifty-two 25-100," it was held, that

the fraction showed that the word omitted was "dollars." *Murrill v. Handy*, xvii. 406.

10. A note was made payable to J. A. H. A firm existed at the time doing business under the style of J. A. H. No evidence being given showing to whom or on what account the note was given, the presumption is, it was given to J. A. H., individually. *Boyle v Skinner*, xix. 82.

See HEIRS, 1; . . . INTEREST, 21, 22.

II. VALIDITY.

a. ALTERATION.

11. The alteration of the date of a note, without the consent of the indorser, vitiates the note as to him. *Aubuchon v. McKnight*, i. 312.

12. Where the payee and one of the joint makers of a note change the time of its maturity, without the consent of the other, such change will release the other maker, unless he subsequently ratifies and confirms it. *King v. Hunt*, xiii. 97.

13. Where a material alteration is made in a promissory note by a third party, without the knowledge or consent of the owner of it, the note is not thereby avoided as against such owner. *Lubbering v. Kohlbrecher*, xxii. 596.

14. A material alteration of a promissory note or bill of exchange will render the same invalid, even in the hands of an innocent holder, as against any party thereto not consenting to the alteration, and this rule applies to an accommodation note fraudulently altered before it is negotiated. *Trigg v. Taylor*, xxvii. 245.

b. CANCELLATION.

15. The cancellation of a note through mistake does not affect the right of action thereon. *Boulware v. Bank of Missouri*, xii. 542.

c. SPOILIATION AND ALTERATION.

16. There is a distinction between the alteration and spoliation of an instrument. The first is usually applied to the act of the party entitled under the instrument, and imputes some fraud or design on his part, to change its effect; the other refers to the unauthorized act of a stranger, and does not change the legal operation of the writing. *Medlin v. Platte County*, viii. 235.

III. PARTIES TO A BILL OR NOTE.

17. Where a party, who is not an indorsee or payee, indorses a note in blank, he is liable as a maker, and may be sued as an original promissor, whether the note is negotiable as an inland bill or not. *Powell v Thomas*, vii. 440. *Hooper v. Pritchard*, vii. 492. *Lewis v. Harvey*, xviii. 74. *Perry v. Barret*, xviii. 140.

18. Parol evidence, however, is admissible to show that he did not sign, as

maker, but as indorser, and that such was the understanding of the parties at the time. *Lewis v. Harvey*, xviii. 74.

19. But although as between parties entitled to look into the real transaction, it may be shown that he signed as indorser, this cannot be shown against a party who took the note in the usual course of business, before it was due, without notice for value. *Schneider v. Schiffman*, xx. 571.

20. The holder of a promissory note, indorsed by several in blank, cannot fill up the blank so as to make them joint indorsers. *Morrison v. Smith*, xiii. 234.

IV. RIGHTS OF HOLDER.

21. The holder of a negotiable promissory note may strike out intermediate indorsements thereon, and maintain an action against a remote indorser thereon. JONES. J., *dis.* *Hunter v. Hempstead*, i. 67.

22. Where one has a claim to promissory notes, payable to another, whose claim is evidenced by possession alone, he cannot with safety part with that possession, without attaching to the instruments, in some way, notice of his rights; and if he does not, his claim will be postponed in favor of a subsequent *bona fide* assignee. *Hughes McAlister*, xv. 296,

V. RIGHTS AND LIABILITIES OF INDORSERS.

23. An indorser of a promissory note or bill of exchange is liable before the remedy is exhausted against the maker. *Hunter v. Price*, i. 53. *Coalter v. Price*, i. 54. *Bank of Missouri v. Price*, i. 54. *Hunter v. Hempstead*, i. 67. *Block v. O'Hara*, i. 145.

24. The indorser of a negotiable note is not liable by reason of the insolvency of the maker. There must have been a demand and notice of non-payment. *Davis v. Francisco*, xi. 572.

25. An indorser cannot plead, in defence to an action on the note, that his indorsement was made on the express condition that it was also to be indorsed by another person, unless knowledge of the circumstances be brought home to the plaintiff. *Bank of Missouri v. Phillips*, xvii. 29.

26. Successive accommodation indorsers on a promissory note are not co-securities as between themselves, unless there is an understanding to that effect; they are responsible only in the order of their indorsements. *McNeilly v. Patchin*, xiii. 40.

27. Accommodation indorsers, as between themselves, may be co-securities; and where, in such case, one of them pays the whole debt, he is entitled to contribution. *Dunn v. Wade*, xxiii. 207.

VI. RIGHTS AND LIABILITIES OF INDORSEES.

28. B. & Co. executed their note to the plaintiffs, who indorsed the same in blank and placed it in the hands of one A. (their agent) for collection. A. trans-

ferred it to the defendants, to whom he was largely indebted, who collected the same and placed the proceeds to the credit of A. on their books—*Held*, that if the defendants knew, at the time they gave A. credit for the amount of the note, that it was the property of the plaintiffs, they were liable to the plaintiffs for the same. *Benoist v. Siter*, ix. 649.

29. An administrator in another State cannot indorse a promissory note made payable to his intestate by a citizen of this State, so as to give the indorsee a right of action thereon in his own name in this State. *McCarty v. Hall*, xiii. 480. See *Stearns v. Barnham*, 5 *Greenl. R.* 261.

30. J. S. accepted a bill of exchange payable four months after date, drawn in blank as to date and name of drawer. W. S., having authority to negotiate it, did so with T. S. G. & Co., who knew at the time of the negotiation that it was ante-dated, and left it in their hands as collateral security to cover an antecedent debt due from him to them—*Held*, that the bill was void in the hands of T. S. G. & Co., the indorsees. *Goodman v. Simonds*, xix. 106.

31. Possession by the indorser of a dishonored bill of exchange is sufficient evidence for him to maintain an action thereon, although at the same time there is on the bill an indorsement from such holder to another party. *Page v. Lathrop*, xx. 589.

VII. SURETY.

32. Where a party makes an indorsement on a note, in these words — “I sign the within as security” — which indorsement is made after the execution of the note, the obligation is collateral, and the party can not be joined in an action against the maker. *Goode v. Jones*, ix. 866.

33. If a plaintiff, in his petition, charges the defendant as guarantor of a note, he can not recover against him as surety, although the defendant sets up in his answer that he is surety, and although the contract of a surety is more onerous than that of a guarantor. *Perry v. Barret*, xviii. 140. See *INFRA*, 102.

34. If A. signs a note as security for B., at the request of the latter, (on condition that B. shall obtain two other signers,) and delivers the note thus signed to B., who obtains only one additional signer, and then gives the note to the payee, who receives no notice of the condition under which A. has signed, the latter is liable on the note. *Terrell v. Hunter*, xxi. 436.

35. A note executed thus — “Two years after date I promise to pay to the order of T., S. & Co., \$4,000 for value received, with interest as per agreement from date,” and by the payees indorsed to a third party — does not, from its form, import that the maker was the principal in the note and the indorsers his sureties. *Tevis v. Tevis*, xxiv. 535.

See *SECURITIES*, 11, 12, 15–18.

VIII. ACCEPTANCE.

36. In an action on a bill of exchange declared on as accepted, but upon which the defendant wrote a refusal to accept, the bill may be given in evidence with-

out first proving its acceptance, since it is not necessary that the acceptance should appear on the bill itself, but may be by parole, or by a separate instrument of writing. *Bent v. Brainard*, i. 283.

37. A letter to an agent directing him to buy a quantity of goods and draw on the writer for the amount, is, under the statute, (R. S. 1845, 172, § 3,) an acceptance of a bill drawn by the agent in favor of a person to whom this letter was shown by him, and who, upon the faith of it, took the bill for value. *Lathrop v. Harlow*, xxiii. 209.

38. The principal in such a case is bound, although the agent drew the bill upon a shipment of a less quantity of goods than was ordered. *Ibid.*

IX. TRANSFER.

a. SUBJECT TO EQUITIES.

39. A party to whom negotiable paper is transferred merely as collateral security for an antecedent debt, will hold it subject to all the equities existing between the original parties. *Goodman v. Simonds*, xix. 106.

40. A. made and delivered his note to B. to be negotiated, and the proceeds applied to the payment of a note soon to become due from A. to C. B. kept the note until after it had become due, then negotiated it and converted the proceeds to his own use—*Held*, that A. was not bound to pay the note. *Scott, J., dis. Wheeler v. Barret*, xx. 573.

See *INFRA*, 43–45.

b. BLANK INDORSEMENT.

41. A blank indorsement of a negotiable note is an authority to the legal holder to assign it, but does not, *per se*, operate an assignment; and a petition describing the note sued on by the indorsee, simply as indorsed in blank, is defective and insufficient; it must set out an assignment. *Menard v. Wilkinson*, iii. 92.

42. A blank indorsement of a promissory note by the payee, though done solely for the purpose of collection, is *prima facie* evidence of an assignment for value, and may be so treated by any subsequent holder. *Odell v. Presbury*, xiii. 330.

c. AFTER DUE.

43. The indorsee of a negotiable note, indorsed after it became due, takes it subject to all the equities attached to it in the hands of the payee. These equities are such as are connected with the note itself, and not such as grow out of distinct and independent transactions between the original parties. A set-off that might have been asserted against the payee, cannot be set up against the indorsee, although the note was transferred after its maturity. *Gullett v. Hoy*, xv. 399.

44. Where a note which is negotiable under the statute is negotiated after its maturity, it is subject to such equitable defenses as the maker might have had against it in the hands of the holder at the time of its maturity. *Shipp v. Stacker*, viii. 145.

45. An action on a promissory note by the indorsee against the maker, is maintainable, even though the payee had indorsed it over after it became due, and without consideration. It is not allowable, during the trial, for the defendant to amend his answer by stating a set-off against the payee of the note. *Powers v. Nelson*, xix. 190.

See SUPRA, 39, 40.

d. NOTE GIVEN TO OFFICER.

46. A note was given to a sheriff for land which he had sold on partition. It bore on its face the official character of the promisee, and the consideration for which it was given. The sheriff assigned the note for value to the plaintiff, went out of office, and the court ordered the unfinished business of the partition to be transferred to his successor. In an action on the note—*Held*, that the assignee could not recover. *Ranney v. Brooks*, xx. 105.

e. INDORSEMENTS AND THEIR EFFECT.

47. It is well settled that the holder of a promissory note, whether negotiable or not, may strike out blank indorsements, but such is not the law with regard to indorsements in full, which confer a legal title to the instrument. *Davis v. Christy*, viii. 569.

48. Where a person who indorses a bill of exchange, whether for value or for the purpose of collection, shall come to the possession thereof again, he is regarded, unless the contrary appears, as the *bona fide* holder and proprietor thereof, and he is entitled to recover, notwithstanding there may be on it one or more indorsements subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike out or not, as he may think proper. [*Davis v. Christy*, viii. 569, commented upon.] *Glasgow v. Switzer*, xii. 395.

49. A bill indorsed after due is equivalent to drawing a new bill at sight. *Per* SCOTT, J. *Davis v. Francisco*, xi. 572.

50. The owner of negotiable paper who indorses and thereby gives it currency though placed in the hands of an agent without consideration, cannot reclaim it or its proceeds from a *bona fide* purchaser for value and without notice; and credit given on the faith of the paper constitutes a valuable consideration that will protect a *bona fide* purchaser. *Odell v. Gray*, xv. 337.

51. Where a note was made payable to the order of "I. J. C., guardian," the indorsement of the guardian's name is sufficient to pass the title to a *bona fide* holder for a valuable consideration. *Thornton v. Rankin*, xix. 193.

X. PRESENTMENT.

52. The presentment of a note to one member of a firm which made the

note, is a good presentment to hold the indorser. *JONES, J., dis. Hunter v. Hempstead*, i. 67.

53. And where a bill is drawn in the course of partnership business, it is competent for one partner to waive the necessity of a presentment, without any special authority for that purpose. *Farmers and Merchants Bank of Memphis v. Lonergan*, xxi. 46.

54. A bill drawn in St. Louis, on the 27th of November, upon a house in New Orleans, payable at sixty days' sight, is presented in time on the 25th of February following, so as to hold the payee responsible to an endorsee. *Little v. Pratte*, i. 201.

55. Demand of payment of a bill of exchange, at the counting-room of the acceptor, of his clerk, in the acceptor's absence, is sufficient, without showing any special authority in the clerk in reference to business of that kind. *Draper v. Clemens*, iv. 52.

56. The bill must be presented when payment of it is demanded. *Ibid.*

57. The demand and protest is good, although made on the last day of grace. *Ibid.*

58. Where a place of payment is designated in the body of the bill or note, a demand of payment at the place designated is necessary, in order to hold the indorser. *Glasgow v. Pratte*, viii. 336.

59. What constitutes due diligence on the part of the holder of a promissory note in making inquiries to ascertain the place of business or residence of the maker, depends upon the circumstances of each case. *Plahto v. Patchin*, xxvi. 389.

XI, NOTICE OF DISHONOR.

a. FORM.

60. A notice of protest which is not signed by any person is insufficient. *Walker v. Bank of Missouri*, viii. 704.

b. BY WHOM TO BE GIVEN.

61. Notice of the dishonor of a bill or note may be given by any party to the same. *Glasgow v. Pratte*, viii. 336.

62. And the holder may avail himself of the notice given in due time by any other party to the bill, against any other person upon the bill who would be liable to him, if he (the holder), had himself given due notice of the dishonor. *Glasscock v. Bank of Missouri*, viii. 443.

63. Where notice of the dishonor of a bill is given by an indorser, and his name is subsequently erased from the bill by the holder, the liability of prior indorsers is not affected thereby. *Ibid.*

c. SERVICE.

64. Notice of protest left with the drawer of a bill, for the indorser, at the drawer's house, where the indorser boarded, is insufficient. *Bailey v. Bank of Missouri*, vii. 467.

65. Proof that the notary made inquiry of several of his acquaintances in different parts of the city of St. Louis, as to the place of business or residence of the maker of a bill, without being able to ascertain either, was held to dispense with proof of notice. *Shepard v. Citizens' Ins. Co.*, viii. 272.

66. Notice of non-payment may be either verbal or in writing. *Glasgow v. Pratte*, viii. 336.

67. Where the holder of a dishonored bill transmits to the last indorser notice of the dishonor, and the latter, on receipt of it, transmits notice to each of the prior parties, such notice is sufficient to charge each of them. *Renshaw v. Triplett*, xxiii. 213.

d. TO WHOM TO BE GIVEN.

68. The *bona fide* vendor of a bill of exchange, on which the indorsement of the payee is forged, is entitled to notice of its dishonor. The holder of such bill, in order to charge the vendor, must exercise reasonable diligence, and what is reasonable diligence must depend upon the circumstances of each particular case. *NAPTON, J., dis. Collier v. Budd*, vii. 485.

69. Although the holder of a time bill is not bound to present it to the drawee for acceptance until its maturity, yet if he does so, and acceptance is refused, he must give due notice thereof to the parties to whom he looks for payment, or they will be discharged. *Glasgow v. Copeland*, viii. 268.

70. Where a note is indorsed for the accommodation of the maker, the indorser is entitled to notice of its non-payment, as in other cases. *Bogy v. Keil*, i. 743.

71. Nothing but the maker's insolvency at the time of the indorsement of his note by the accommodation indorser, or some such circumstances as show that the indorser did not rely upon the maker's ability or punctuality, or had no right to rely upon the payment by the maker, will dispense with the necessity of giving the indorser notice. *Ibid.*

72. An indorser is entitled to notice although the drawer of the bill had no funds in the hands of the drawee. *Glasgow v. Copeland*, viii. 268.

73. Where the indorser, on the day the note became due, consented, on payment of half the amount of the note, that the maker might have another week to pay the balance due, it was held, that notice of non-payment of the balance at the end of the week was not necessary to fix the indorser. *Glasgow v. Prate*, viii. 336.

74. Notice of the dishonor of a bill to one member of a firm is notice to all. *Bouldin v. Page*, xxiv. 594.

e. BY MAIL.

75. Proof that notice of protest was sent to the drawer at his place of residence, through the mail, is insufficient, where it appears doubtful whether a post-office was then established there. *Draper v. Clemens*, iv. 52.

76. It is not indispensable that the notice of the dishonor of a bill should be sent to the post-office nearest to the residence of the party, nor even to the town in which he resides, if it be, in fact, sent to the post office to which he usually resorts for his letters. *Per NAPTON, J. Glasscock v. Bank of Missouri*, viii. 443.

77. A notice of protest, placed in due time in the post-office, directed to a prior indorser, is sufficient, although it should never be received. *Per* SCOTT, J. *Renshaw v. Triplett*, xxiii. 213.

f. WAIVER.

78. Where a bill of exchange has been protested for non-payment, but notice thereof has not been given to the drawer, evidence of a subsequent promise by the drawer to pay the bill at a particular time, and in a particular mode, should be allowed to go to the jury as evidence of a waiver of notice. JONES, J., *dis. Pratte v. Hanly*, i. 35. *Mense v. Osbern*, v. 544.

79. An acknowledgment by an indorser of a promissory note that the debt was due, but that, by the laws of the country where the note was made, he was not liable as indorser until the remedy was exhausted against the maker, is not such an acknowledgment as amounts to a waiver of notice and proof of presentment. *January v. Todd*, i. 567.

80. What facts will excuse demand and notice, or amount to a waiver of notice, is a question of law for the determination of the court. *Wilson v. Huston*, xiii. 146.

81. Where an indorser of a negotiable note, with a knowledge of the failure of the holder to make a demand upon the maker or acceptor, makes an unconditional promise to pay, or acts in such a way as to show an acknowledgment of his liability, with a full knowledge of the facts which would discharge him, he thereby impliedly waives demand and notice. *Ibid.*

82. A promise to pay a bill of exchange after its dishonor, raises a legal presumption of notice to the drawer, and dispenses with the necessity of proof of notice of protest for non-payment. *Dorsey v. Watson*, xiv. 59. *Clayton v. Phipps*, xiv. 399.

g. SUFFICIENCY.

83. Proof that notice was given to an indorser "soon" after protest, is insufficient. *Glasgow v. Copeland*, viii. 268.

84. If a bill be protested for non-acceptance and afterwards for non-payment, notice of the latter is sufficient as between intermediate indorsers, neither of whom, (by reason of accident,) had seasonable notice of the former. *Renshaw v. Triplett*, xxiii. 213.

h. EVIDENCE.

85. In an action on a protested bill of exchange, the protest should be received in evidence to prove the fact that the bill was protested, but not to prove presentment and non-payment of the bill, and notice to parties. *Robinson v. Johnson*, i. 434.

86. It is an established principle, that when an officer performs a duty required by law, his official statement of its performance is evidence of the fact. Therefore the protest of a notary of a negotiable note, stating the demand and non-payment is evidence of these facts. (R. S. 1835. 98, § 7.) *Moore v. Bank of Missouri*, vi. 379.

87. Protest and notice may be shown by the notary orally, although he kept a register, and his notarial certificate would be evidence of the facts sworn to. *Draper v. Clemens*, iv. 52.

88. The character of a notice to the indorsers of the dishonor of a promissory note may be proven by parol. A notice to produce the notice is not necessary. *Johnston v. Mason*, xxvii. 511.

See SUPRA, 24; . . . PRACTICE, 255.

XII. ACTION ON BILLS AND NOTES.

a. PLEADING.

89. A petition which states that the defendant "made his note, and thereby promised to pay," &c., is sufficient, although the note on its face appears to have been executed by the defendant, as attorney for other parties. Under this allegation, the plaintiff may prove such facts as make the defendant personally liable. *McMartin v. Adams*, xvi. 268.

90. Under the new code, in an action on a promissory note, it is sufficient to pray judgment "for the amount of the note with interest." The pleader may proceed at once from the statement of the defendant's liability to his breach of contract in failing to pay, whether the action be against one or more partners; and need not aver that it has not been paid by an indorser who is not joined in the suit. *Page v. Snow*, xviii. 126.

See PLEADING, 1, 4, 5, 129, 151, 163.

b. PARTIES.

91. An indorser of a promissory note or bill of exchange may be sued simultaneously with the maker. JONES, J., *dis.* *Hunter v. Hempstead*, i. 67.

92. So under the practice act of 1849. *Holland v. Hunton*, xv. 475.

93. And the holder may sue all or any of the parties at his option. *Page v. Snow*, xviii. 126.

94. A note was executed to three partners, two of whom, upon a settlement of the partnership affairs, for value, sold and transferred, by delivery, their interest in the note to the third—*Held*, that the third might sue on it in his own name. *Canefox v. Anderson*, xxii. 347.

c. EVIDENCE.

95. In an action by the assignee of a promissory note against the maker, evidence of a verbal agreement that it should be paid otherwise than as provided in the note, is inadmissible. JONES, J., *dis.* *Barton v. Wilkins*, i. 74.

96. An affidavit to prove an indorsement upon a bond, bill or note, under the act of February 16, 1847, (Acts 1846-7, 109,) may be taken before a Justice. *Glasgow v. Switzer*, xii. 395.

See SUPRA, 89; . . . PLEADING, 165; . . . PRACTICE, 158.

d. DEFENSE.

97. A. and B. executed their joint note to C. for a sum of money, and before it became due, B. paid one-half the amount thereof, and C. thereupon said that he released him from the payment of the other half. Upon the death of C., six or eight years afterward, his administrator sued B. on the note and obtained judgment for the whole amount thereof. B. then filed a bill praying an injunction to restrain the collection of the judgment, and the defendant not appearing, the bill was taken as confessed, and a decree entered, making the injunction perpetual. On writ of error it was *held*, that the verbal release of B. by C. from the payment of the balance of the note was not binding, and that the payment of one-half might have been set up as a defense to the action on the note; and the bill was dismissed. *Strong v. Hopkins*, i. 530.

98. A written agreement by the payee of a note with the maker, that, if it should not be convenient for the maker to pay the note at maturity, he would wait his convenience, cannot be pleaded in bar to an action on the note, with an averment that it has not been convenient to pay the same. The defendant's remedy, if he has suffered injury, is on the contract. *Atwood v. Lewis*, vi. 392. *Bond v. Worley*, xxvi. 253.

99. So, a separate agreement under seal, with regard to the payment of promissory notes, cannot be set up in bar. The remedy is upon the agreement. *Bircher v. Payne*, vii. 462.

100. The defendants, as securities for one A., signed a note in blank, which was to be filled up by him for \$400, and made payable to the Bank of Missouri; but A. made it payable to the plaintiff and delivered it to him for value—*Held*, that the defendants were liable, notwithstanding the plaintiff had full knowledge of all the facts in relation to the note at the time he took it. *Harris v. Enyart*, xiii. 108.

101. It is no defense to a negotiable promissory note in the hands of a *bona fide* holder, for value, that the defendant, (the first indorser,) indorsed it while blank, upon an understanding with the maker that he should fill it up with a less sum than that actually inserted. *Tumilty v. Bank of Missouri*, xiii. 276.

102. The contract of a guarantor on a promissory note is different from that of a surety. The former is collateral to the note itself, and binds the guarantor in case of presentment and dishonor. The guarantor can defend himself on the ground of laches only so far as he has been injured by it. *Perry v. Barret*, xviii. 140. See SUPRA, 33.

103. In an action by an administrator upon a note, an allegation in the answer that the intestate, before his death, "gave the note to the defendant, and made arrangements to have it delivered up to him, which was neglected to be done," is no defense; these facts constitute neither a *donatio causa mortis*, nor a valid gift or equitable release. *Henderson v. Henderson*, xxi. 379.

104. A. sold a stock of goods to B., both being, at the time, residents of Missouri, for which B. gave his note to A. B. afterwards removed to California, and A. transmitted the note to C. for collection. C. surrendered the note to B., and received, in renewal thereof, another note from B., made payable to the order of

"C., attorney of A." While this note remained in the hands of C., B. obtained a discharge under the insolvent law of California, the note to C. being included in the schedule of his debts. C. afterwards indorsed the note to A. in Missouri, who commenced suit thereon against B.—*Held*, that the discharge under the insolvent law of California did not release B. from liability on the note to C. *Crow v. Coons*, xxvii. 512.

See FRAUD, 18;....SALE, 27;....USURY, 1.

E. NOTES DUE BY INSTALMENTS.

105. One instalment of a note due by instalments may be recovered before the others are due. *Caples v. Branham*, xx. 244. See LIMITATIONS, 6-8;....PRACTICE, 26, 97;....WITNESS, 77, 78.

See CONSIDERATION, III;....DAMAGES, 8-13;....SET-OFF, 3, 6-8, 15, 20, 24, 25.

BOATS AND VESSELS.

I. LIEN.

- a. GENERAL PRINCIPLES.
- b. COMMENCEMENT AND DURATION.
- c. EXTINGUISHMENT.
- d. WAGES AND MONEY LOANED TO PAY DEBTS.
- e. SUPPLIES AND MATERIALS.
- f. WHARFAGE AND ANCHORAGE.
- g. AFFREIGHTMENT, TRANSPORTATION AND INJURIES.

II. LIABILITY AND RIGHTS OF OWNERS.

III. PARTIES TO ACTION.

IV. COMPLAINT.

V. AFFIDAVIT.

VI. BOND.

VII. PROCESS.

VIII. PLEADING AND PRACTICE.

IX. SALE AND DISTRIBUTION OF PROCEEDS.

X. LIABILITY AS BAILEES.

XI. COLLISION.

XII. EVIDENCE.

XIII. APPEAL.

I. LIEN.

a. GENERAL PRINCIPLES.

1. The lien given by the statute to certain claims against steamboats, does not extend to claims originating in other States against boats not engaged in naviga-

ting the waters of this State, so as to attach on the arrival of such boats within the jurisdiction of this State. *St. Bt. Raritan v. Pollard*, x. 583. *Noble v. St. Bt. St. Anthony*, xii. 261. *Twitchell v. St. Bt. Missouri*, xii. 412. *James v. St. Bt. Pawnee*, xix. 517.

2. In proceedings against steamboats, the rules of the maritime law govern in the absence of statutory regulations. *Finney v. St. Bt. Fayette*, x. 612.

3. The Mississippi river, from the northern to the southern boundary of the State of Missouri, belongs to the waters of this State, within the meaning of the statute relating to boats and vessels. *Swearingen v. St. Bt. Lyna*, xiii. 519.

4. Where the claim of a part owner against a steamboat comes within the provisions of § 1 of the act relating to boats and vessels, it is a lien upon it. The only restriction upon the part owner is that he is required to give twenty days' notice in writing to all the other owners, of his intention to commence suit. (R. S. 1845, 181, §§ 1, 36.) *Langstaff v. Rock*, xiii. 579.

5. The statutes relating to boats and vessels apply to boats and vessels owned in other States, as well as to those owned here. *Yore v. St. Bt. C. Bealer*, xxvi. 426. *Wood v. St. Bt. Fleetwood*, xxvii. 159.

b. COMMENCEMENT AND DURATION.

6. A note given and payable at a future day, but within the duration of the lien, will not merge the original debt, nor extinguish the lien. *St. Bt. Charlotte v. Hammond*, ix. 58.

7. But it is otherwise where the note is not payable until after the expiration of the time limited in the statute for the continuance of the lien. *Darby v. St. Bt. Inda*, ix. 645. Although a note does not extinguish the original cause of action, but only suspends the right to sue during the time given in the note, yet a party cannot recover on the original contract, without producing the note or accounting for its absence. And the discharge of the maker of the note, under the Bankrupt Law, does not excuse the non-production of the note. *St. Bt. Charlotte v. Lumm*, ix. 63. See *INFRA*, 14.

8. Where goods are delivered to a vessel, under a special contract, the lien on the vessel for the price of the goods attaches on the day of the delivery of the first parcel, and, in estimating the time, when the statute of limitations begins to run, the day of delivery of the last parcel should be excluded. *St. Bt. Mary Blane v. Beehler*, xii. 477.

9. And an open running account against a steamboat continues to be a lien from the date of the last item. *Carson v. St. Bt. Daniel Hillman*, xvi. 256.

10. A. loaned B., part owner of a steamboat, \$1000, to pay for repairs and other expenses of the boat. Within six months the money was in the clerk's desk to pay A. When he called for it, B. paid him \$150, and asked a further loan of the balance for the use of the boat, which was assented to, and the balance left in the clerk's desk—*Held*, that this was a new loan and protected by the statute as a lien upon the boat. *Phelps v. St. Bt. Eureka*, xiv. 532.

11. Under the statute of 1845 relating to boats and vessels, where a complaint

was filed before the expiration of the six months for which the lien continued, against a boat which was, at the time, beyond the jurisdiction of the court, and after the expiration of the six months the boat came within the county, and was seized under an *alias* warrant—*Held*, that the lien was not saved. *Williamson v. St. Bt. Missouri*, xvii. 374.

12. The statute (R. S. 1855, 313, § 42,) which provides that suits to enforce liens in any other than the first class, shall, in St. Louis county, be commenced within six months, does not apply to causes of action that had accrued more than six months previous to the day the revised code of 1855 went into effect. *Ridgley v. St. Bt. Reindeer*, xxvii. 442.

C. EXTINGUISHMENT.

13. The lien on boats and vessels, under the statute, (Acts 1838–9, 13,) is divested by proceedings and a sale under the act relating to boats and vessels (R. S. 1835, 102,) at the suit of any person holding a lien thereon, without regard to the priority of such liens, in point of time; and the purchaser at such sale will hold the boat discharged therefrom. *St. Bt. Brady v. Buckley*, vi. 558.

14. Receiving a negotiable note in payment of an account against a boat and its transfer by an indorsement in blank and delivery to one who received it on the faith of the lien, does not extinguish the legal right to enforce the lien by the payee in a suit to the use of the holder. *St. Bt. Charlotte v. Kingsland*, ix. 66. See SUPRA, 6, 7.

15. A judicial sale of a boat to satisfy a lien of any class, conveys to the purchaser a title free from the liens of every other class, superior as well as inferior. *St. Bt. Raritan v. Smith*, x. 527.

16. Maritime liens are divested by a judicial sale, in whatever jurisdiction it may be decreed. *Finney v. St. Bt. Fayette*, x. 612. See *St. Bt. Raritan v. Smith*, x. 527.

17. The sale of a boat, on an execution against the owners, in Louisiana, will not divest a pre-existing lien, acquired against the boat under the statutes of this State. *St. Bt. Sea Bird v. Beehler*, xii. 569. *Ritter v. St. Bt. Jamestown*, xxiii. 348.

18. Where a steamboat is seized and upon the execution of a bond, under the statute, (R. S. 1845, 182, § 9,) with security, is discharged from further detention, the boat is entirely discharged from the lien, which cannot thereafter be revived by an order for further security, and to retake the boat until further security be given, and by the court rescinding its approval of the bond. *Carson v. St. Bt. Elephant*, xxiv. 27.

19. And after such bond is given, it is error in the court to render judgment ordering the sale of the boat. [*Evans v. King*, vii. 411, explained.] *Perpetual Ins. Co. v. Ford*, xi. 295.

20. Although such judgment be erroneous, and an execution thereon irregular, the parties thereto are not liable to an action of trespass for levying such irregular execution on such boat, notwithstanding she had become the property of another owner. *Ibid*.

21. But where the subsequent owner paid the execution under protest, after the levy thereof, he may recover the amount so paid in an action for money had and received. *Ibid.*

d. WAGES AND MONEY LOANED TO PAY DEBTS.

22. A barge is embraced in the statutes relating to boats and vessels, and is subject to a lien for services. *Barge Resort v. Brooke*, x. 531.

23. A part owner of a boat, whether his right be absolute or as mortgagee in possession, cannot acquire a lien on the boat for services rendered while he was such part owner. Nor can he proceed against the boat without giving the other part owners the notice required by the statute. (See Acts 1838-9, 13, § 5.) *St. Bt. Raritan v. McCloy*, x. 534.

24. No lien attaches to a boat under the statute (R. S. 1845, 181, § 1) for money loaned to the master to pay the debts of the boat. *Bryan v. St. Bt. Pride of the West*, xii. 371.

25. The claim of a clerk upon a boat for wages, is not a statutory lien upon it. *St. Bt. Globe v. Herbert*, xiii. 577. See *INFRA*, 53.

e. SUPPLIES AND MATERIALS.

26. Where a party furnishes merchandise to the master of a boat on credit, to enable him therewith to procure the necessary supplies for the boat, in the prosecution of her voyage, the debt thus created is a "debt contracted by the master on account of supplies furnished for the use of such boat," within the meaning of the statute (R. S. 1835, 102, § 1). *St. Bt. Brady v. Buckley*, vi. 558.

27. The lien of a mechanic upon a boat, under the statute, (R. S. 1835, 102, § 1,) is not affected by his parting with the possession. A purchaser is bound to exercise ordinary diligence, or he will not be protected by want of notice of such lien. *St. Bt. Charlotte v. Hammond*, ix. 58.

28. Evidence showing that keel-boats were repaired for the use of the steam-boat Louisa, and were used to assist her in navigating the river, although not originally constructed for the Louisa, is admissible to show that they were appurtenances of that boat. (Acts 1838-9, 13, § 1.) *Amis v. St. Bt. Louisa*, ix. 621.

29. A note given for money loaned to a person to enable him to purchase a boat is no lien on the boat. *St. Bt. Lebanon v. Grevison*, x. 536.

30. A barge may be necessary to a boat, and as such, will be regarded as a "material furnished" for the equipment of the boat. (R. S. 1845, 181, § 1.) *Gleim v. St. Bt. Belmont*, xi. 112.

31. Persons who furnish supplies to a boat, are not bound to inquire whether the master or agent who has actual possession of it, is legally entitled to such possession, in order to secure a lien. *St. Bt. Lehigh v. Knox*, xii. 508.

32. Supplies furnished to a boat, on the order of the steward, engineer or mate, with the knowledge or consent of the master, constitute a valid demand against it. *Voorhees v. St. Bt. Eureka*, xiv. 56.

33. Goods furnished to the master of a boat to supply the place of goods lost in the course of transportation, and thus enable the boat to fulfil a contract of

affreightment, are not "supplies," within the meaning of the second clause of § 2 of the statute, and do not constitute a lien upon the boat. *Bailey v. St. Bt. Concordia*, xvii. 357.

34. A ship-carpenter, who contracts to repair a boat for a specific sum and to furnish the materials, is not an "agent of such boat" within the meaning of the statute, (R. S. 1845, 181, § 1, cl. 2,) and cannot create a lien upon the boat in favor of the lumber merchant who furnished him with lumber. *Childs v. St. Bt. Brunette*, xix. 518.

35. One who indorses a note given by the master of a steamboat for stores and supplies furnished, and who pays the same at its maturity, does not thereby become subrogated to the rights of the one furnishing the supplies to a lien on such boat. *Hays v. St. Bt. Columbus*, xxiii. 232.

See *INFRA*, 58.

f. WHARFAGE AND ANCHORAGE.

36. Where a wharf boat lay alongside of the public wharf, and was used by a steamboat for three days, wharfage being in the meantime paid to the city by the steamboat, it was *held* that the owners of the wharf boat had no lien on the steamboat for the use of their boat. *Bersie v. St. Bt. Shenandoah*, xxi. 18.

g. AFFREIGHTMENT, TRANSPORTATION AND INJURIES.

37. Where one takes possession of a boat, without the consent of the owners, and makes a contract of affreightment and violates it, the boat is not liable under the statute. *St. Bt. Madison v. Wells*, xiv. 360. *Bates v. St. Bt. Madison*, xviii. 99.

38. Under the statute (R. S. 1845, 181, § 1, cl. 4,) an action cannot be maintained against a boat, for damages sustained by a hand, in being forced ashore by the master, in breach of a contract of hiring. The clause only embraces injuries in which the boat was an agent, such as collisions and the like. *Blass v. St. Bt. Robert Campbell*, xvi. 266.

39. If a boat expressly contracts to land a passenger at a particular point, with a knowledge of the danger of effecting a landing at that point, such danger will be no defence to an action for damages for the non-fulfilment of the contract. *Porter v. St. Bt. New England*, xvii. 290.

40. The plaintiff, at Louisville, Kentucky, engaged passage on a steamboat for Cairo, Illinois. Before the boat arrived at Cairo, the plaintiff, with the consent of the officers of the boat, extended his passage to St. Louis, and paid his fare. Before he changed his destination, his trunk was lost—*Held*, that under the statute relating to boats and vessels, he had no lien upon the boat for damages. *Fisk v. St. Bt. Forest City*, xviii. 587.

41. Where the master of a boat on a trip up the river, made a contract for the transportation of freight on the return trip, an action will lie, under the statute, (R. S. 1845, 181, § 1, cl. 4,) against the boat *in rem*. *Taylor v. St. Bt. Robert Campbell*, xx. 254.

42. Where the contract was for the transportation of a specific number of

articles, it is no defense, in a suit for the breach of the contract, which the defendant did not offer to fulfill, that the plaintiff did not have so large a number ready for transportation. *Ibid.*

43. A telegraphic dispatch, in reply to one delivered to a boat at Lexington, on the Missouri river, agreeing to transport freight, without naming to what place, was allowed to be read to the jury as evidence of a contract by the master to transport to St. Louis. *Ibid.*

44. To show a contract of affreightment, it was proved that A. sent a despatch to B., which was properly delivered, and that a despatch, purporting to come from B. in reply, was deposited in the office to be forwarded to A., which was done the next day—*Held*, that the dispatch in reply might be read to the jury. *Ibid.*

45. A dray ticket, containing an acknowledgment of the receipt of goods to be transported, and a statement, in pencil marks, of the rate of freight thus—“30 cents per 100 lbs.,” and signed by a clerk of a steamboat, is not conclusive as to the rate of freight. The words “30 cents per 100 lbs.” may be shown to have been inserted by fraud, mistake or surprise. *Wood v. St. Bt. Fleetwood*, xxii. 560.

46. The power of reshipping, contained in a bill of lading, is a privilege reserved to the boat and not an additional undertaking. It is not therefore a breach of the contract of affreightment if, by reason of low water, the boat is obstructed, and thereby fails to deliver the goods, which by reshipping might have been delivered. *Sturgess v. St. Bt. Columbus*, xxiii. 230.

47. A bill of lading partakes of the nature of a receipt, and of a contract. So much as partakes of the nature of a receipt may be explained or contradicted by parol testimony. *St. Bt. Missouri v. Webb*, ix. 192.

See *INFRA*, 56.

II. LIABILITY AND RIGHTS OF OWNERS.

48. The law concerning ships and sea-going vessels is not applicable to flat boats. The person making the contract for freight in flat boats, and not the owner of the boat, is entitled to it. *Johnson v. Strader*, iii. 359.

49. Joint ownership of a boat cannot be inferred from the fact of a partnership in the contract for building it. *Ibid.*

50. In an action against the owners of a boat for a loss occasioned by the sinking of a boat after a deviation, it is not necessary to prove that the deviation caused the loss. It is sufficient to show the deviation and subsequent loss. *Walsh v. Homer*, x. 6.

51. Where several persons engage in the building of a steamboat, all the owners are liable for materials furnished for its construction, although purchased by one of them, it not appearing that there was any agreement to give the credit alone to that one, even though there may have been an agreement between the owners that each should build a particular part of the boat. *Saltmarsh v. Rowe*, x. 38.

52. Where one of the owners of a steamboat invites a person to take an excursion upon the boat, he, and not the person invited, will be liable to the other owners. *Frazer v. Yeatman*, x. 501.

53. One part owner of a boat cannot sue the others at law for services rendered by him as clerk, under an employment by the captain, who was also a part owner. *Hinton v. Law*, x. 701. See SUPRA, 25.

54. As to the liability of the owners in case of the unseaworthiness of their boat. *Collier v. Valentine*, xi. 299.

55. The captain of a boat, as such, has no power to sell it, or any part thereof, without special authority from the owners. *Kelly v. Dickinson*, xv. 193.

56. Where a party fails to furnish freight for a steamboat according to agreement, the measure of damages is the price agreed to be paid for the transportation, unless the defendant can show that the damages actually sustained were less. *Dean v. Ritter*, xviii. 182.

57. A custom or usage among masters and clerks of steamboats for the master to draw bills of exchange upon the clerk and negotiate the same, is an unreasonable custom, and cannot fix a liability upon the owners. *Clark v. Humphreys* xxv. 99.

58. A master of a vessel, as such, has power to bind the owners for necessaries and repairs only; and the burden of proving the necessity lies upon the creditor. *Ibid.*

59. Where there is a misunderstanding as to the rate of freight to be paid on a shipment on a steamboat, and the shipper demands the redelivery of the goods, and the boat refuses to redeliver, but transports them to their destination, they will not be entitled to demand a higher rate of freight of the consignee than that inserted in the dray ticket, notwithstanding the receiving clerk of the boat may have signed the ticket through mistake or oversight. *Wood v. St. Bt. Fleetwood*, xvii. 159.

See SUPRA, 4, 23.

III. PARTIES TO ACTION.

60. A steamboat cannot sue in its own name for an injury done to her, but must proceed in the name of the owners. *St. Bt. Blue Ridge v. St. Bt. Time*, ix. 642.

61. Under the statute relating to boats and vessels, (R. S. 1845, 187, § 35,) one of several part owners of a steamboat may sue in the name of the boat. *St. Bt. Beardstown v. Goodrich*, xvi. 153.

IV. COMPLAINT.

62. A complaint against a vessel, under the statute relating to boats and vessels, on a contract of affreightment, must set out the contract, its terms and the parties to it, when made, and that the suit was commenced within six months

after the cause of action accrued. (R. S. 1835, 103, §§ 4, 21.) *Perpetual Ins. Co. v. St. Bt. Detroit*, vi. 374.

63. But it is not necessary to describe the property sued for more particularly than it is described in the bill of lading. *Camden v. St. Bt. Georgia*, vi. 381.

64. It is no objection to the complaint that it states the cause of action in different ways in different counts. *Ibid.*

65. It is the duty of the court to grant leave to amend a complaint against a vessel for breach of an affreightment contract, the same as in a common law declaration. *Ibid.*

66. It is sufficient that the complaint shows upon the face of it that the action against such boat was commenced within six months after the cause of action accrued, without an averment of the fact. *Russell v. St. Bt. Elk*, vi. 552.

67. And the fact that a boat was seized within the jurisdiction of the courts of this State, is *prima facie* evidence that such boat was used in navigating the waters of this State. *Ibid.* *Byrne v. St. Bt. Elk*, vi. 555. *Silver v. same*, vi. 557.

68. Under the provisions of the statute of 1839, (Acts 1838-9, 13, § 1,) regulating proceedings against boats and vessels, it is not necessary that the complaint should follow the words of the statute. *St. Bt. Reveille v. Case*, ix. 498.

69. Where a suit is instituted against a boat, either before a Justice or a court of record, it must appear from the demand filed that the same is a lien. *Luft v. St. Bt. Envoy*, xix. 476.

70. But in an action for labor, by one described in the account filed as "fireman," or as "deck-hand," it is not necessary to allege that the labor was performed "on board the boat;" that is sufficiently implied. *Jones v. St. Bt. Morrisett*, xxi. 142. *Williams v. St. Bt. Morrisett*, xxi. 144.

71. So a complaint which states that the demand "accrued against the said steamboat on account of the mate, the captain or the clerk, agents thereof, for work and labor done on board of said steamboat as a laborer," &c., is sufficient. *Holland v. St. Bt. R. H. Winslow*, xxv. 57.

72. A complaint filed against a steamboat to enforce a lien for wages, which states "that thirty days have not elapsed since the demand for services accrued to him," and accompanied by affidavit that this "is the only demand that he (complainant) has against said steamboat," is sufficient. *Byrne v. St. Bt. St. Mary*, xxvii. 296.

See DEMAND, 8.

V. AFFIDAVIT.

73. The affidavit required to be made to the complaint of the plaintiff in a suit under the act relating to boats and vessels, (R. S. 1835, 103, § 4,) if made by a person other than the plaintiff, should show the affiant's means of knowledge of the facts stated in the complaint. *Bridgeford v. St. Bt. Elk*, vi. 356. *Hamilton v. St. Bt. Ironton*, xix. 523.

74. And this defect is not waived by the party procuring a continuance in the court below. *Hamilton v. St. Bt. Ironton*, xix. 523.

75. The affidavit of the complainant in an action against a boat, stating that the facts set forth in the complaint "are true to the best of his knowledge," is sufficient. [*Bridgeford v. St. Bt. Elk*, vi. 356, referred to and explained.] *St. Bt. Osprey v. Jenkins*, ix. 635.

76. A complaint verified as follows—"A. B., attorney for plaintiff, makes oath and says he believes the foregoing petition and the matters therein, as stated, are true. A. B., attorney for plaintiff"—is insufficient. *Eldridge v. St. Bt. Wm. Campbell*, xxvii. 595.

VI. BOND.

77. An amendment of the statement of the cause of action in a proceeding against a steamboat, which does not change the cause of action, will not release the securities in the bond given to release such boat. The securities should take notice of the amendment. *Merrick v. Greely*, x. 106.

78. Upon a proceeding under the statute, (Acts 1846-7, 11, § 1,) no process can issue against a boat until a bond is filed, and it is error to allow a bond to be filed *nunc pro tunc*. *St. Bt. Archer v. Goldstein*, xiii. 24.

VII. PROCESS.

79. An officer's return, showing that he executed process against a steamboat by seizing the hull and other parts of the boat, as then lying at the wharf, partly taken to pieces, and in process of being broken up, is sufficient to authorize an order to sell said boat with her tackle, apparel and furniture. *Gaty v. Garrison*, xiv. 33.

80. So the return of a constable, showing that he executed it by going on board the boat and reading the same to the clerk, and by finding the sheriff in charge of her, is sufficient to give the Justice issuing the warrant jurisdiction to hear and determine the case. *St. Bt. Eureka v. Noel*, xiv. 513. *Parkinson v. St. Bt. Robert Fulton*, xv. 258.

81. A sheriff's return to a writ against a boat is defective in not stating the seizure of the boat. *Blaisdell v. St. Bt. Wm. Pope*, xix. 157.

82. But it need not state that he still retains possession of her. *Ibid*.

VIII. PLEADING AND PRACTICE.

83. To a complaint founded on contract against a steamboat, under the act relating to boats and vessels, a plea of not guilty is bad. *Erskine v. St. Bt. Thames*, vi. 371.

84. An interplea cannot be entertained in a suit under the act relating to boats and vessels. *Garrison v. McAllister*, xiii. 579.

85. A suit was brought, under the statute relating to boats and vessels, by a

creditor against a steamboat, and it was seized. A., the owner of the boat, as principal, and two sureties, bonded the boat. Pending the suit, A. died, and his death was suggested on the record. After judgment against the boat, on motion, a judgment was rendered against A.'s administrator and the sureties. The administrator was not made a party to the proceeding, nor did it appear from the record that he had any notice of it—*Held*, that the judgment against the administrator was not void, but voidable, and could only be set aside by a direct proceeding for that purpose, operating on the judgment itself in the court where it was rendered. *Childs v. Shannon*, xvi. 331.

86. The plaintiff having seized a boat, and bond being given by an owner thereof, under the statute, (R. S. 1845, 182, § 9,) the plaintiff cannot have judgment against the boat, or the proceeds thereof after sale, but judgment must be against the principal and surety in the bond. *Auvray v. St. Bt. Pawnee*, xix. 537.

87. A judgment rendered by a Justice in St. Louis county against a steamboat, may be certified, under the statute, (R. S. 1855, 311, § 32,) to the clerk of the Common Pleas Court, and be enforced as other judgments rendered against boats and vessels in that court. *Mooney v. St. Bt. Navigator*, xxvi. 522.

See PRACTICE, 52, 130, 140, 221.

IX. SALE AND DISTRIBUTION OF PROCEEDS.

88. Where several judgments were obtained against a steamboat, and a sale of the boat takes place under the judgments, an attaching creditor, whose attachment was levied prior to the rendition of the judgments, is entitled to be first paid out of the proceeds of the sale by the sheriff. *Dobbys v. Sheriff*, v. 256.

89. A boat cannot be sold under an execution issued by a Justice, under the statute. (See R. S. 1845, 185, § 24.) *Markham v. Dozier*, xii. 288.

90. An officer seizing a boat, has no authority to hold her without bond, subject to final process in the suit. It is his duty to apply for an order of sale, unless she is bonded within five days after the seizure. (R. S. 1845, 183, § 11.) *Blaisdell v. St. Bt. Wm. Pope*, xix. 538.

See JURISDICTION, 66.

X. LIABILITY AS BAILEES.

91. The rule which imputes carelessness to a captain whose boat strikes a known rock or shoal, unless driven by a tempest, is only applicable to the navigation of the ocean, where the rocks and shoals are marked upon maps and may be avoided, and does not apply to the navigation of our rivers. In such navigation, each case must be governed by its own circumstances, and be tested by the course usually pursued by skilful pilots in such cases. *Collier v. Valentine*, xi. 299.

92. And negligence is not to be inferred from the fact that a boat passed in the night a point in the river known to be difficult and dangerous of navigation. *Ready v. St. Bt. Highland Mary*, xvii. 461.

93. The principle, that if a bailee gratuitously undertakes to do an act, he will be liable for negligence, can have no application to steamboats. *Chouteau v. St. Bt. St. Anthony*, xx. 519.

XI. COLLISION.

94. Where a keel boat is moored in a proper place, and is reasonably protected from contact with other vessels, and is injured by a steamboat, the owners of the steamboat are liable, although its managers used ordinary care. *St. Bt. United States v. City of St. Louis*, v. 230.

95. A steamboat is not necessarily liable for sinking a flat boat when running out of the usual channel of the stream. There must be some negligence on the part of her officers to render her liable. *St. Bt. Western Belle v. Wagner*, xi. 30.

96. In an action for an injury to a boat, by collision, the measure of damages is the amount paid for raising and repairing the boat, with interest thereon, to the rendition of the verdict, where there is nothing to impeach the reasonableness of the sum paid. *Atchison v. St. Bt. Dr. Franklin*, xiv. 63.

97. Where, immediately after a collision between two boats, a person looked at their condition, he was permitted to testify in regard to the impression made upon his mind as to the position in which they came together. *Patrick v. St. Bt. J. Q. Adams*, xix. 73.

98. What is a proper precautionary measure in itself, uninfluenced by rule, usage or custom, to avoid collisions of steamboats, is a question of law. Signals by bells are not, as a matter of law, without regard to usage or custom, a proper measure of precaution. *Rogers v. McCune*, xix. 557.

99. If, in case of collision, both parties are in fault, and the fault or negligence of each contributes to the injuries received, neither party can recover. This doctrine does not apply to a case in which the fault or negligence of the plaintiff contributes only remotely and indirectly to the injury complained of, as where his wrong consists in mooring his boat in a prohibited place at a wharf. The defendant in such case must exercise ordinary care and prudence. *Adams v. Wiggins Ferry Co.*, xxvii. 95.

See EVIDENCE, 102.

XII. EVIDENCE.

100. A note given by the clerk of a boat is evidence in an action against said boat, of the justice as well as the amount of the claim sued on. *Byrne v. St. Bt. Elk*, vi. 555. *Silver v. St. Bt. Elk*, vi. 557.

101. It is competent evidence in a suit against a boat, on a note given by a former owner for services, to show that the note was given and accepted as the individual note of such former owner, and for this purpose the maker of the note is a competent witness. *Barge Resort v. Brooke*, x. 531.

See EVIDENCE, 102, 103, 136, 137.

XIII. APPEAL.

102. Where, in a suit against a boat before a Justice, a judgment by default is rendered, and a motion to set the same aside is made and overruled, an appeal lies. *Hore v. St. Bt. Belle of Attakapas*, xi. 107.

See COMMON CARRIER;....LAWS, 22;....SLAVES AND SLAVERY, 14-25;
....WITNESS, 83-86.

BOND.

- I. EXECUTION.
- II. CONSIDERATION.
- III. BREACH.
- IV. CONSTRUCTION.
- V. OFFICIAL BOND.
- VI. PARTIES TO ACTION ON.
- VII. PLEADING AND PRACTICE.

I. EXECUTION.

1. A bond is binding on all the obligors who sign, seal and deliver it, although the names of only a part of them are recited in the body of the instrument. [*Adams v. Wilson*, x. 341, OVERRULED.] *Keeton v. Spradling*, xiii. 321. *Johnson v. St. Bt. Lehigh*, xiii. 539. *Cunningham v. The State*, xiv. 402.

See INFRA, 10.

II. CONSIDERATION.

2. A partial failure of the consideration of a bond is no ground of defense to an action upon it, either in law or equity. (But it is otherwise by the R. S. 1855, 1290, § 24.) *Bruffey v. Brickey*, v. 395.

3. The statute (R. S. 1835, 359, § 7,) permitting the obligor of a bond to impeach its consideration, applies only to causes originating before a Justice. *Buford v. Byrd*, viii. 240.

III. BREACH.

4. If the performance of the condition of a bond is prevented by the act of God by the obligee, or by the law, the bond is discharged. *Olive v. Alter*, xiv. 185.

IV. CONSTRUCTION.

5. A bond, reciting a sale by the obligor to the obligee of certain land, and binding the obligor to make, within a certain time, to the obligee "a good and sufficient deed of warranty, which shall vest in the obligee the fee simple estate to the land, free and clear of all incumbrances," is not fulfilled by the execution of a deed purporting to convey such an estate, where the grantor was not seized of an estate in fee simple in the land, free of all incumbrances. *JONES, J., dis. Price v. Rector, i. 107.*

6. And in an action founded on such bond, defendant pleaded a tender and refusal of such a deed; plaintiff replied, admitting the tender and refusal, but averred that at the time of the tender, the defendant was not seized of an estate in fee simple, clear of incumbrance; on issue taken on the replication and found for the plaintiff—*Held*, on a motion in arrest of judgment, that the issue was material. *JONES, J., dis. Ibid.*

7. A bond for \$12,000, conditioned that if the obligors should, within a certain time, pay \$6,000, payable in shaved deer skins at forty cents to the pound, then the bond should be void, &c., is not an obligation to deliver the necessary quantity of deer skins, to make the amount of the debt, at forty cents per pound; nor is the value of the deer skins, at the time of payment, to be the measure of damages recoverable on the bond; but it is an obligation to pay so much money, which may be discharged by the delivery of the requisite quantity of skins; and if that be not delivered, the debt remains fixed at the sum stated in the bond; and this construction cannot be controlled by evidence that, by the custom of the country, such a contract was understood and taken to be a peltry contract, and that the sum of \$6,000 being mentioned was to be understood as a means of ascertaining the number of pounds of deer skins to be paid, when taken in connection with the price per pound being fixed at forty cents. *Clamorgan v. Guisse, i. 141.*

8. In an action against A., on a bond conditioned for the payment of a sum of money, if a verdict or decision should be had in favor of A., in a certain suit then pending against him, the condition of the bond is satisfied by showing that the plaintiff in that suit, after a jury was sworn, suffered a non suit, and judgment was thereon entered for A. *English v. Scott, i. 495.*

9. An indorsement or memorandum upon a bond, not made at the time of its execution, is no part of the bond. *Nichols v. Douglass, viii. 49.*

10. The circumstances under which an instrument is executed are proper to be considered in its construction, and a bond payable to "C. County and Missouri," will, to give effect to its objects, be construed as payable to C. County in the State of Missouri. *Gathwright v. Callaway Co., x. 663.*

11. Where the condition of a bond consists of several different parts, some of which are lawful and others not, it is good for so much as is lawful, and void for the rest. Where a bond is given by two, conditioned that neither they nor a third person shall do a certain act, though it be void as to the obligors, if valid as to the third person, the whole penalty is forfeited by a violation of the condition by such third person. *Presbury v. Fisher, xviii. 50.*

12. A bond from A. to B. for a valuable consideration, conditioned that

neither A. nor C. shall thereafter publish a counterfeit detector, is not void as being in restraint of trade. It amounts to an indemnity to B., in the event that his business should be interfered with by C., and imposes no restraint on C. *Ibid.*

18. A. made an assignment to B. for the benefit of his creditors, and C. attached the goods assigned and summoned B. as garnishee, whereupon the latter, in order to obtain a surrender of the goods attached, executed a bond to C., with this condition: "whereas, the sheriff," &c., (reciting the facts of the commencement of suit by attachment, the seizure, &c.,) "now, if said obligee should fail to sustain his said suit so commenced by attachment as aforesaid, or if said obligee should sustain his said suit so commenced by attachment as aforesaid, and obtain judgment against said B. as garnishee of A., and the said B. shall within thirty days thereafter, pay the amount of such judgment to said obligee, then this obligation to be void. It is understood that by judgment, is meant final judgment, and that the said B. will, in fulfillment of the condition of this obligation, pay any judgment which may be rendered in the attachment suit aforesaid against A., or against himself as garnishee of said," &c., &c.—*Held*, that the contingency provided for in the condition of the bond was a failure, on the part of B., to pay such a judgment in the attachment suit as would reach the property attached, that is, a judgment against himself as garnishee of A., and not a general judgment against A. *Hardcastle v. Hickman*, xxvi. 475.

V. OFFICIAL BOND.

14. The 5th section of the act of 1841 (Acts 1840-1, 31,) does not extend the liability of securities; it only gives a more summary remedy against them in cases in which they were liable at the time of the passage of the act. *TOMPKINS, J., dis. McCurdy v. Brown*, viii. 549.

15. The securities of an officer, appointed for a limited time, are only liable for his official acts during the term for which he was appointed. *Moss v. The State*, x. 338.

16. They are liable alone for his official misconduct, and where those who, by law, have the control of his official acts, employ him in matters foreign to his office, the securities will not be liable for his acts while so employed. *Nolley v. Callaway County Court*, xi. 447.

17. Thus, where the law concerning the school fund required the clerk of the County Court to keep the bonds given on the loan of such funds, and the County Court to renew them, and to pass upon their sufficiency, and the court order or permit these duties to devolve upon the treasurer, and any loss thereby ensues, his securities are not liable therefor. *Ibid.*

18. And where if the County Court permit the treasurer to use such funds as a loan to himself, and any loss occurs, his securities will not be liable. *Ibid.*

19. Where an officer, under color of his office, executes process, and collects money under it, his securities are liable for a misapplication of it, although the writ may be defective, erroneous, or even totally illegal. *Rollins v. The State*, xiii. 437.

VI. PARTIES TO ACTION ON.

20. A bond payable to two jointly, must be sued in their joint names, and it makes no difference that only one was interested in the consideration for which it was executed. *Bailey v. Powell*, xi. 414.

21. A bond executed to A., "guardian of B.," is evidence of a debt due to the former, and may be sued upon by his legal representative. The words "guardian of B.," are merely descriptive of the person. *Jeffries v. McLean*, xii. 538.

22. Under the new code (Acts 1848-9, '75, § 1.), a bond with a collateral condition may be assigned, so as to enable the assignee to sue in his own name. *Waterman v. Frank*, xxi. 108.

VII. PLEADING AND PRACTICE.

23. A plea that the bond sued on by A. was obtained from the defendant by one B., (from whom the consideration for the bond moved,) and made payable to A., by fraud, covin and misrepresentation, is good. *Montgomery v. Tipton*, i. 446.

24. A plea stating that the bond sued on was obtained by fraud, covin and misrepresentation, and specifying that the fraud consisted in a false representation of the soundness of a slave, upon a sale of which the bond was given, is bad. The fraud is not in obtaining the bond, but in misrepresenting the quality of property received for it. *Ibid.*

25. Under § 1, p. 615, R. S. 1825, the plaintiff, in his declaration on a penal bond (conditioned to be void on the payment of a less sum on a day certain,) must set out the condition and assign breaches. *Fulkerson v. Steen*, iii. 377.

26. But if, in the condition of such bond, the performance of other things is provided for, it falls within the provisions of § 2, of said act, and the plaintiff is at liberty to set out the breaches or not, as he pleases. *Ibid.*

27. To a suit on a bond for \$1800, the defendant, after oyer, set out the bond (which had a condition for the payment of \$900, by instalments,) and pleaded *non est factum* without affidavit—*Held*, 1, that the plea could not be stricken out as a nullity; 2, that the bond must be produced on trial, and that a variance might then be taken advantage of; 3, that the issue of *non est factum* could not be found for the defendant; 4, that the finding of payment has no effect after the finding of *non est factum*; 5, but, that the plaintiff could not have a judgment, while it appeared from the record that there was a condition to the bond sued on, which was not set out in his declaration. *Payne v. Snell*, iv. 238.

28. Under a plea of *non est factum*, the defendant cannot show that the bond sued on, was a stake put up by him against a similar bond by the plaintiff, as a wager upon the result of an election. In order to put in issue such a state of facts, they must be specially pleaded. *Stapleton v. Benson*, viii. 13.

29. W. and others gave a bond to indemnify N. against all claims against the firm of W., N. & W. Suit was afterwards brought against the firm, and judgment rendered against them. The other defendants, N. not joining, filed a

motion, and had the judgment set aside. Execution having previously been issued, the amount was paid by N., and a suit was brought by him on the indemnifying bond to recover the amount thus paid—*Held*, that under the plea of *nul tiel* record, the defendant was entitled to show by the record of the proceedings subsequent to the judgment, that the judgment had been set aside; and that N. could not recover for money paid by him under that judgment, it not being properly a “molestation,” within the meaning of the bond. He could only recover for money lawfully collected from him. *Wales v. Nelson*, x. 19.

See ADMINISTRATION, III; ATTACHMENT, III; BOATS AND VESSELS, VI; CONSTABLE, III; COSTS, I; COUNTY TREASURY, III; EXECUTION, IX; GUARDIANS AND CURATORS, V; JURISDICTION, 29; REPLEVIN, VIII; REVENUE, 29–33; SHERIFF, III.

BONDS, NOTES AND ACCOUNTS.

I. FORM AND EFFECT.

- a. GENERALLY.
- b. SEALED.
- c. EXECUTION.

II. CONSIDERATION.

III. ASSIGNMENT.

- a. GENERALLY.
- b. IN BLANK.
- c. ASSIGNMENT OF AN ACCOUNT.
- d. PROOF OF ASSIGNMENT.
- e. PAYMENTS AFTER ASSIGNMENT.

IV. LIABILITY OF THE ASSIGNOR.

- a. GENERALLY.
- b. WHERE THE MAKER IS INSOLVENT.
- c. MEASURE OF DAMAGES.
- d. JUSTICE'S JURISDICTION.

V. ACTION.

- a. PLEADINGS.
- b. PARTIES.
- c. DEMAND.
- d. DEMAND AND NOTICE.
- e. PROTEST.
- f. ERASURE.
- g. EVIDENCE.
- h. LOST BOND—AFFIDAVIT.
- i. VERBAL ACCEPTANCE OF AN ORDER.

VI. DEFENSE.

VII. SET OFF.

VIII. CONSTRUCTION OF THE STATUTE.

I. FORM AND EFFECT.

a. GENERALLY.

1. An instrument in writing in the following form : "I am indebted to C., for work done for me, in building for me a saw-mill, \$506 39; which sum, on his order, I promise to pay D., with interest;" is a conditional promissory note to D., payable on the production of C.'s order, and D. can maintain an action thereon against the promisor. *Bent v. Brainard*, i. 283.

2. A note, by which the maker promised "to pay E. R., or order; one hundred and eighty dollars in carpenter's work," is not a note payable in "money or property," and is not assignable under the statute of July 3d, 1807. (Gey. Dig. 66, § 1.) *Bothick v. Purdy*, iii. 82.

3. So, also, where the payment is to be made "in cut stone work." *Prather v. McEvoy*, viii. 661.

4. An acknowledgment of indebtedness in these words, "due J. W., four hundred dollars, to bear ten per cent. interest," is a good promissory note. *McGowen v. West*, vii. 569.

5. A. made his note, under seal, in the following form: "due B., thirty-eight dollars, to be paid January 23, 1820, that being the time the note he signed to me on H. is due. It is also observed that the aforesaid sum is to be paid out of the amount arising from H.'s note, signed to me by said B.; and I bind myself to collect the money of H. as soon as practicable"—*Held*, that the instrument imports an absolute and unconditional promise to pay at the time specified; that the obligation to pay is not conditioned upon the collection of the money from H. *James v. Robinson*, i. 595.

6. Where a note is made payable so soon as the amount can be made on a suit in which the maker of it was plaintiff, and the heirs and legal representatives of one C. were defendants, and it appeared that there were two suits pending, one literally corresponding with the case described in the note, and the other varying from it in that the widow of C. was a defendant, the note will not be held due until the money is made in the former suit, in the absence of any other proof to show which case was intended in the note. *Allen v. Davis*, xi. 479.

7. An instrument in these words, "due A. B., \$100, to be paid over to him as soon as collected at P., now in the hands of H. B. P., of that place," or these, "due A. B., \$34 63, for goods purchased of him while at P., to be paid as soon as collected from my accounts at P.," is a promissory note. The words "to be paid," &c., prescribe the time of payment by indicating the fund out of which it was expected to be made, and gives a reasonable time for the collection of the accounts. *Ubsdell v. Cunningham*, xxii. 124.

b. SEALED.

8. A sealed instrument is not a note, and cannot be sued on as such. *Brown v. Lockhart*, i. 409. *Benqist v. Inhabitants of Carondelet*, viii. 250.

9. A bond in these words, "I, C. L., promise to pay, &c., witness my hand and seal, this, &c., C. L., [seal] for S. R. and G. K.," is improperly described in a summons issued by a Justice as a note. Such bond is the bond of C. L., and cannot be produced in evidence in an action against S. R. and G. K. on a note. *Kennerly v. Weed*, i. 672.

C. EXECUTION.

10. Where a bond is executed by V. in the name of V. & Co., it is good as the several bond of V. If his name was signed thereto by some one of the company, without authority, he must plead *non est factum* to avail himself of that. *Fletcher v. Vanzant*, i. 196.

11. A note signed by matter of description, by which the promisors can be ascertained, is a valid note within the statute, (R. S. 1845, 189, § 1.) *Sanders v. Anderson*, xxi. 402.

II. CONSIDERATION.

12. In an action by the assignee against the maker of a single bill obligatory, a plea that the consideration given by the payee for the bill was fraudulent, is a good plea under the act of July 3, 1807, (1 Ter. L. 122, § 53,) which made such instruments assignable, and authorized the assignee to sue in his own name, but provided that "the nature of the defense in law that any defendant may have against the assignee or the assignor," should not be changed. *Ewing v. Miller*, i. 234.

13. It is not necessary, in order to enable the payee of an order to recover the amount thereof from the acceptor, that the order should purport to be for value received. *Griffith v. Cotrell*, i. 480.

14. As between an indorsee and his immediate indorser, the consideration may be inquired into, and the indorsee can recover no more than the consideration he paid for the note. *Klunk v. O'Fallon*, i. 481.

15. In an action between the maker and the assignee of a note, the consideration given by the assignee for the note is immaterial. *Moore v. Candell*, xi. 614.

16. It is not necessary that the consideration of a promissory note should move from the payee to the maker. Therefore, where A. executed a bond to B. to make title to certain lands on a certain day, in case B. should, on or before that day, pay to A. a certain sum of money, and B. at the time assigns the bond to C., who thereupon executed his note to A. for the sum which, by the terms of the bond, was to have been paid by B., it was *held*, that the assignment of the bond to G. was a good consideration, moving from B., to support the promise made to A. in the note. *Russell v. Barcroft*, i. 514.

17. A promissory note given in consideration of a parol agreement to convey land, where there is no refusal on the part of the payee to convey, or other fault committed by him, is valid. *McGowen v. West*, vii. 569.

18. In an action on a non-negotiable note by the assignee against the maker, the defendant answered that, being security for the payee, the latter deposited

with him a chattel as a pledge for his indemnity, and he thereupon gave him the note merely as evidence of the deposit—*Held*, that these facts constituted a good plea of want of consideration. *Doan v. Moss*, xx. 297.

19. A promise in writing to pay a specified sum to trustees, to be appointed by a convention, is a valid note within the meaning of the statute, (R. S. 1845, 189, § 1,) and imports a consideration. *Caples v. Branham*, xx. 244.

20. In such a case it is not necessary that the names of the trustees should be inserted at the time the note is executed. It is sufficient if they are inserted before suit brought. *Ibid*.

21. An instrument in these words, "I promise to pay G. W. Crow one hundred dollars if the Lewis county road is not opened and kept open along the creek where it is now located, or if said Crow should make null the present proceedings of the court and commissioners as already had and done by them. I also agree that if said road is opened and kept open, that said Crow shall have all the damages that may ever be assessed me for the same—Feb. 7, 1855, [signed] J. H.,"—is a note within the meaning of the statute, (R. S. 1845, 189, § 1) and imports a consideration, and is not champertuous on its face. *Crow v. Harmon*, xxv. 417.

22. An accepted order, payable in articles to be manufactured by the acceptor at a future time, does not import a consideration and cannot be sued upon as an inland bill of exchange, or as a promissory note; nor does it, like an accepted order to deliver specific articles which are designated, vest the property in the person in whose favor it is drawn. *Jeffries v. Hager*, xviii. 272.

III. ASSIGNMENT.

a. GENERALLY.

23. A covenant to pay rent is not assignable under the statute relating to bonds and notes. (R. S. 1835, 105, § 2.) *Thomas v. Cox*, vi. 506.

24. But an agreement between A. and B., by which the former leased certain premises to the latter for the term of one year, with the privilege of another year, at the rate of \$200 per annum, payable quarterly, and if not paid the lessor to re-enter and have a lien on the stock of goods in the store, is assignable, and suit thereon must be brought in the name of the assignee. *Wooden v. Butler*, x. 716.

25. And an agreement in writing to pay a specific sum in property, is assignable under the statute, (R. S. 1845, 190, § 2.) *Knighton v. Tufli*, xii. 531.

26. The assignment of a bond or note must be in writing to enable the assignee to maintain an action thereon in his own name, and the writing itself should show that the assignment had been made; parol evidence is inadmissible to prove that fact. *Miller v. Paulsell*, viii. 355.

27. An assignment of a bond or note can only be made by a writing executed by the assignor. *Ashworth v. Crockett*, xi. 636.

28. But may be on a paper separate from the assigned instrument. *Able v. Shields*, vii. 120.

29. When the assignment of a note is conditional, it is not the duty of the maker to ascertain whether such condition has been complied with, and the title of the assignee thereby extinguished. *Ibid.*

30. An assignment of a receipt given for the collection of certain notes, does not transfer to the assignee the legal title to the notes. *Rittenhouse v. Myers*, x. 305.

31. A. and B. made to C. a bond for the payment of \$1300, with a provision therein that said sum should not be payable until C. should make, execute and tender to A. a good and sufficient deed, conveying a clear title in fee simple, with warranty, to certain lots of land—*Held*, that such bond was assignable, and that the assignee might maintain an action thereon in his own name. *Minor v. Edwards*, x. 671.

32. The condition which provided for the non-payment of the \$1300 until the conveyance was made, could be waived by parol. *Ibid.*

33. What acts and declarations would amount to a waiver is a question of law for the determination of the court; whether such acts were in fact performed, or declarations made, is for the jury to find. *Same case*, xii. 137.

34. The acceptance of a deed, formal and correct upon its face, while the premises were incumbered by judgment liens, is not a waiver of the condition, unless it appears that the grantee had knowledge of their existence. *Ibid.*

35. A count upon such bond, averring the making a deed as required by the proviso, must make profert of such deed. *Same case*, x. 671.

36. But a count, averring simply the making a deed, which was accepted in discharge of the conditions, need not make profert of the deed. *Ibid.*

b. IN BLANK.

37. A blank indorsement of paper not negotiable is a mere authority to the holder to fill it up, and, until this is done, the legal title remains in the payee. *Wiggins v. Rector*, i. 478. *Taylor v. Larkin*, xii. 103.

38. And such blank indorsement does not authorize a subsequent indorsee to fill up the indorsement in his own name, nor does it authorize the immediate indorsers to fill up the blank with the name of a stranger. *Muldrow v. Agnew*, xi. 616.

c. ASSIGNMENT OF AN ACCOUNT.

39. A formal assignment of an account is not necessary; any act showing an intent to transfer the party's interest is sufficient. *Smith v. Sterritt*, xxiv. 260.

40. An assignee of an account for value, previous to a garnishment, will hold against the plaintiff, although the assignee may not have given prior notice. [*Richards v. Griggs*, xvi. 416, explained.] *Smith v. Sterritt*, xxiv. 260. See ACTION, 32.

d. PROOF OF ASSIGNMENT.

41. In an action on an assigned note, the execution of the assignment must be proved. *Simms v. Lawrence*, ix. 657.

42. And proof that the maker had admitted the assignment is, *prima facie*, sufficient. *Powell v. Adams*, ix. 758.

43. So, part payment by the defendant to the plaintiff, after the assignment, and a promise to pay the balance, is sufficient, *prima facie*, to establish the assignment. *Yankee v. Crawford*, xiii. 475.

C. PAYMENTS AFTER ASSIGNMENT.

44. Where a bond is transferred by delivery only, without a written assignment, it may be paid by the maker to the obligee, after the transfer, but before notice of such transfer given by the equitable assignee to the maker. *Heath v. Powers*, ix. 765.

See ASSIGNMENT, I.

IV. LIABILITY OF THE ASSIGNOR.

a. GENERALLY.

45. A promissory note was negotiable at common law, which was adopted in 1816, (1 Ter. L. 436) and under the act of July 3, 1807, (1 Ter. L. 122, § 53,) the assignee might maintain an action against his immediate assignor at once. *Irvin v. Maury*, i. 194.

46. The act of January 7, 1822, provided that thereafter no assignor of a bond, bill or promissory note should be liable to an action thereon by an assignee, unless the assignee should have used due diligence, by the institution and prosecution of a suit at law against the maker, for the recovery of the amount thereof. (1 Ter. L. 838, § 2.) Before the passage of that act, the assignee could sue the assignor at once—*Held*, as to a note made, indorsed and maturing before the act was passed, the condition of the parties was fixed, and the act was inoperative to compel the assignee to exhaust his remedy against the maker, before proceeding against the assignor. *Schlatter v. Rector*, i. 286.

47. Under the R. S. 1825, p. 143, § 2, relating to bonds, bills and notes, the assignor of a note is liable only where the assignee has used due diligence to collect of the maker, or shows that a suit against the maker would have been unavailing; and it is for the jury to determine whether such diligence has been used. *Harris v. Harman*, iii. 450.

48. And where one of the makers of a joint note resides in New York, the holder must sue him before he can maintain an action against the assignor, unless he shows that a suit in New York would have been unavailing. *Myers v. Miller*, iii. 586.

49. The assignee takes the place of the assignor, and must exercise the same measure of diligence in collecting of the maker which a prudent man would use who had no recourse against any other party. *Jacobs v. McDonald*, viii. 565.

50. And where the note is payable on demand, suit must be brought against the maker at the first term after the assignment. *O'Fallon v. Kerr*, x. 553.

51. The assignee can recover of his assignor only so much as could not, by due diligence, be collected of the maker. *Ricketson v. Wood*, x. 547.

52. And if he fails to sue the maker at the next term of the court, or first law day of a Justice, when within his jurisdiction, without excuse, he thereby discharges the assignor. *Stone v. Corbett*, xx. 350.

53. And where the maker dies, or assigns his property for the benefit of his creditors, before the note matures, the assignee must proceed against the estate, or against the property in the hands of the trustee, or show that neither course would have been availing, and this is a question of fact for the jury. *Clemens v. Collins*, xi. 320.

54. The obtaining of a judgment against the maker before a Justice, and filing a transcript in the Circuit Court, on an execution being returned unsatisfied by the constable, without any further action, is not such due diligence in prosecuting the suit against the maker as will subject the assignor. (R. S. 1835, 105, § 9.) *Jacobs v. McDonald*, viii. 565.

55. The neglect of an officer, in levying an execution against the maker, in order to discharge the assignor, must be such as will clearly give the assignee an action against him for the amount of the execution. *Ibid.*

56. H. assigned to A. the balance due on an obligation against P., on which there was an indorsement. In an action by the assignee against the assignor for a deficiency, it appeared that the assignor, a short time before the assignment, had received and receipted fifty-one dollars, which had not been applied on the obligation—*Held*, that it was not necessary for the assignee first to have sued the obligor before resorting to the assignor for the deficiency. *Harmon v. Armstrong*, v. 274.

57. Although the assignee of a note not negotiable cannot sue a remote assignor at law, he may do so in equity. A court of equity will give a remedy by making him immediately liable who is ultimately so, to avoid multiplicity of suits; and in such case the original assignor may make the same defenses against the remote, that he could make against his immediate assignee. *Smith v. Harley*, viii. 559.

58. The only way in which an assignee of a non-negotiable note can reach a remote assignor is by a proceeding in the nature of a bill in equity, in which must be shown the grounds on which such assignor would be liable to a remote assignee. *Weaver v. Beard*, xxi. 155.

b. WHERE THE MAKER IS INSOLVENT.

59. If, when a note matures in the hands of an assignee, the maker is so insolvent that a suit against him would be unavailing, it is not necessary for the assignee to sue him before suit against the assignor. *Clemens v. Collins*, xiv. 604. *Baker v. Blades*, xxiii. 405.

60. And such insolvency is sufficiently shown by proof that it was not in the power of the holder to enforce collection of him by suit. *Pococke v. Blount*, vi. 338.

61. But it is not sufficient to show that his visible property was not equal in value to the amount of the debt. *Pillard v. Darst*, vi. 358.

62. The maker who has the means of paying a sufficient portion of the note to make it worth the expense of a suit, is not so insolvent as to entitle the assignee to recover of the assignor without suit against the maker. *Ricketson v. Wood*, x. 547.

63. Where it appears that the maker was insolvent at the time a note matured, his insolvency will be presumed to continue until the contrary is shown. *Mullen v. Pryor*, xii. 307.

C. MEASURE OF DAMAGES.

64. The measure of damages to be recovered against an assignor by the assignee, is the consideration received by the former, with interest. *Muldrow v. Agnew*, xi. 616.

D. JUSTICE'S JURISDICTION.

65. The statutory action by the assignee of a note against the assignor, upon failure to obtain payment from the maker, is not, it seems, to be regarded as an action upon the note for the purpose of giving jurisdiction to a Justice, when the amount sought to be recovered exceeds his jurisdiction in other actions of assumpsit. *Stone v. Corbett*, xx. 350.

See JURISDICTION, 40, 48.

V. ACTION.

A. PLEADINGS.

66. In an action on an assigned note, the plaintiff need not show by his declaration that he sues as assignee. *Alexander v. Hayden*, ii. 211.

67. But, under the new code, he must state the facts which give him title to the bond sued on. It is not sufficient to aver that he is the legal holder. *Smith v. Dean*, xix. 63.

68. In an action against the assignor, the declaration must aver the existence of such facts as will, under the statute, render him liable. *Wimer v. Shelton*, vii. 266.

69. And must show that the holder has used due diligence in the employment of proper means to collect of the maker, as the question of diligence is one of law to be determined by the court. A declaration is, therefore, defective which does not show that a suit was commenced against the maker at the next term following the maturity of the note sued on, or allege an excuse for it. *TOMPKINS, J. dis. Collins v. Warburton*, iii. 202.

See PLEADING, 9.

B. PARTIES.

70. In an action on a promissory note, it is a good plea that it was assigned by the plaintiff before the institution of the suit. Such a suit must be brought

in the name of the assignee, and not in that of the assignor to the use of the assignee. (See R. S. 1825, 143, § 1.) *Thomas v. Wash*, i. 665.

71. A note payable to R. M., or bearer, is not negotiable within the meaning of the statute, (R. S. 1835, 105, § 6,) and cannot be sued in the name of the bearer without an assignment from the payee. *Beatty v. Anderson*, v. 447.

72. A note made payable to one of the makers or order, but not negotiable under the statute is a promissory note, and may be sued on in the name of the assignee of such maker, in a suit against him alone, and it is not necessary to allege a consideration. *Muldrow v. Caldwell*, vii. 563.

73. Such a note will stand as it did at common law, but subject to equitable defenses and a set-off on the part of the maker, and will not carry damages on dishonor. *Per Scott, J. Ibid.*

74. The statute (R. S. 1835, 459, § 18,) allowing the holder of a bond to sue such of the makers as he chooses, applies in the case of a bond executed by a partnership in the firm name. *Griffin v. Samuel*, vi. 50.

75. But where a firm executes a non-negotiable note to one of its members, neither he nor his assignee can maintain an action thereon at law. *Hill v. McPherson*, xv. 204.

76. An instrument in these words, "Mr. Emanuel Folker can, upon this my order, at any time, receive from my kiln sixty-three dollars in lime," dated and signed, is a promissory note for property within the meaning of the statute, (R. S. 1845, 190, § 2,) and is assignable, so that the assignee may maintain an action thereon in his own name. *Draher v. Schreiber*, xv. 602.

77. The assignee, to whom a promissory note has been assigned for collection, may sue in his own name. He is the real party in interest, within the meaning of the code of 1849. *Webb v. Morgan*, xiv. 428.

78. An assignment for the benefit of creditors of "certain notes," reciting, among others, the note sued on, is a sufficient transfer of the note to enable the assignee to maintain an action thereon in his own name. *Able v. Shields*, vii. 120.

79. So also where the assignment was of "the within described notes," mentioning the note in suit. *Thornton v. Crowther*, xxiv. 164.

80. And an assignment expressed in these words, "all goods, wares, merchandise, chattels, notes, bills, bonds," &c., is a sufficient transfer to enable the assignee to sue in his own name. [OVERRULING *Miller v. Paulsell*, viii. 355.] *McClain v. Weidemeyer*, xxv. 364.

81. A debt evidenced by a note which is lost may be assigned, and the assignee may sue thereon in his own name. *Long v. Constant*, xix. 320.

82. One of two payees of a promissory note may assign his interest in it to the other, who may then maintain an action thereon in his own name. (R. S. 1835, 105, §§ 2, 3.) *Smith v. Oldham*, v. 483.

83. Under the statute, (R. S. 1835, 105, § 2,) the assignee of a promissory note must sue in his own name. An action in the name of the assignor will not lie. *Jeffers v. Oliver*, v. 433. *Langham v. Lebarge*, vi. 355.

C. DEMAND.

84. In order to maintain an action on a note made payable "in carpenter's

work," a special request to do some specific carpenter's work is necessary. *Bothick v. Purdy*, iii. 82.

d. DEMAND AND NOTICE.

85. In a suit on a note not negotiable under the statute, by the indorsee against the indorser, it is not necessary to show demand and notice, although the note was payable to order. *Pococke v. Blount*, vi. 338.

e. PROTEST.

86. A protest of a non-negotiable note, being unauthorized, cannot be used as evidence of its assignment. *Williams v. Smith*, xxi. 419.

87. Nor can an erased blank indorsement of such note be used as evidence of its transfer. *Ibid.*

f. ERASURE.

88. Where a credit has been indorsed on a bond or note, which was subsequently erased, the erasure must be explained by the payee. *McElroy v. Caldwell*, vii. 587.

89. But it is not necessary for the plaintiff to explain an erased indorsement thereon, since the indorsement does not, *per se*, establish an assignment. *Finney v. Turner*, x. 207. But see *INFRA*, 102.

90. The erasure, by the obligee of a bond, of the name of one of the obligors, without the consent of the others, releases them all. *Briggs v. Glenn*, vii. 572.

g. EVIDENCE.

91. In an action of debt on a bond, defendant pleaded, first, payment, and second, that he executed the bond as security, and had given the plaintiff notice to institute suit against the principal, which was not done in due time, and issue taken on both pleas—*Held*, that on the trial the plaintiff need not give the bond in evidence. *Carson v. Clark*, i. 159.

92. Possession of a note payable in specific articles is *prima facie* evidence of ownership; and payments made thereon in good faith by the maker, vests the title to the property received in payment, agreeably to the terms of the note, in the holder. *Himes v. McKinney*, iii. 382.

93. Possession of a bond or note is *prima facie* evidence of ownership, and gives the holder a right to receive payment thereof, or to sue the same in the name of the obligee or payee. *Singleton v. Mann*, iii. 464.

h. LOST BOND—AFFIDAVIT.

94. In actions on lost bonds, the affidavit of loss, &c., may be made before a Justice. (See 2 Ter. L. 313.) *Kearney v. Woodson*, iv. 114.

i. VERBAL ACCEPTANCE OF AN ORDER.

95. Where a debtor verbally accepts a written order from his creditor, in favor of a third person, he is liable thereon to the latter, although it is otherwise,

under the statute, (R. S. 1845, 172, § 1,) as to bills of exchange. *Curle v. Perpetual Ins. Co.*, xii. 578.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, XII; . . . LIMITATIONS, 6; . . . PRACTICE, 132.

VI. DEFENSE.

96. The payment of a promissory note by the maker to the payee, without notice of an assignment, while the note was current and immature, is no defense to it in the hands of a purchaser prior to such payment, and, *per* TOMPKINS, J., it is wholly immaterial whether or not the note was mature at the time of the assignment. (See R. S. 1825, 143, § 1.) *Bates v. Martin*, iii. 367. [But see *Wolf v. Cozzens*, iv. 431; and *Gates v. Kerby*, xiii. 157; and R. S. 1855, 322, § 3.]

97. The statute relating to bonds and notes, (R. S. 1835, 105, § 3,) which provides that the defense of the maker of a note shall not be affected by an assignment thereof, applies as well to equitable as legal defenses. *Barton v. Rector*, vii. 524.

98. A note was given for part of the consideration of a contract, and afterwards assigned. The contract was then rescinded in a judicial proceeding to which the assignee was not a party—*Held*, that this rescission did not affect the assignee. *Powers v. Heath*, xx. 319.

99. Where a note is given, payable on the happening of a contingent event, it is no defense to an action thereon that the event did not happen, if it was through the defendant's agency that it did not, and the plaintiff had done everything to entitle him to payment. *Vandemal v. Dougherty*, xvii. 277.

VII. SET-OFF.

100. A note payable to the payee, or "order, for value received, without defalcation," but not containing the words "negotiable and payable," is not negotiable as an inland bill of exchange, under the statute, (R. S. 1835, 105, § 6,) and is subject to all equities in favor of the maker against the original payee. *Austin v. Blue*, vi. 265.

101. A note by which the makers "promise to pay, &c., without defalcation," is not negotiable as an inland bill of exchange, and is subject to the defense of a total failure of consideration, (R. S. 1835, 105, §§ 3, 6,) but is not subject to a set-off of claims due from the assignor to the makers. *Maupin v. Smith*, vii. 402. *Maguire v. Conran*, viii. 107.

102. An assignment in full of a non-negotiable note cannot be canceled, as may be done with negotiable paper. The parties to such instruments cannot defeat a set-off which the maker may have against an assignee, as would be done if assignments in full were permitted to be canceled. *Billings v. Atchison*, xv.

86. See SUPRA, 89.

103. A note not negotiable, but by its terms made payable "without defalcation or discount," is exempt from any set-off against the assignor arising after assignment and before notice. Art. III, § 3, of the new code, does not repeal § 3 of the statute of 1845, relating to bonds and notes. *Smith v. Ashby*, xx. 354.

104. Unless it is expressed in a promissory note that it is "for value received, negotiable and payable without defalcation," the maker thereof will be allowed against an assignee of the same every just set-off or other defense that existed at the time of or before notice of the assignment, as against the assignor thereof. *Thomson v. Roatcap*, xxvii. 283.

VIII. CONSTRUCTION OF THE STATUTE.

105. The word "judgment," in § 4 of the act relating to bonds and notes, (R. S. 1835, 105,) is an error, and should be read "assignment." *Frazier v. Gibson*, vii. 271.

106. Sec. 9 of the statute relating to bonds and notes, embraces all bonds and notes not specified in §§ 6, 7, 8, of said statute. (R. S. 1835, 105.) *Pococke v. Blount*, vi. 338.

BOUNDARY AND DESCRIPTION.

I. IN A DEED.

II. IN EJECTMENT.

III. CONFIRMATION.—See PUBLIC LANDS.

I. IN A DEED.

1. Known and fixed boundaries and monuments, called for in a grant or deed, control the courses and distances stated in the same instrument. *McGill v. Somers*, xv. 80.

2. If, in a conveyance of land, the description be not a mere reference to the survey of a fractional section as made by the United States, but by a specific reference to the books in the register's office, as they exhibited that section, the effect is the same as if a diagram corresponding with the plat in the register's office had been annexed to the deed. *Shelton v. Maupin*, xvi. 124.

3. Although a survey of the United States within a confirmed claim is of no force against the claimant, yet when he adopts the survey as designating any portion of his land, it may furnish a valid description by which he may convey such portion. *Per GAMBLE, J. Ibid.*

4. When a deed from the government or an individual describes the land as partly bounded by a river, the river boundary will be adhered to, although it does not correspond with established corners and monuments. *Ibid.*

5. If a deed refers to a Spanish concession for the boundaries of the land conveyed, and was executed after the action of the government, with the consent of the claimant, had located the concession, and there is no call in the concession inconsistent with such location, it will pass the land on which the concession has been located. [*Page v. Scheibel*, xi. 167—commented upon and confirmed.] *Harrison v. Page*, xvi. 182.

6. "Cedar Cabin" was the name by which a tract of land was known to the parties. On the tract stood a cedar cabin of trifling value. A. "resigned all his right, title and interest to the Cedar Cabin" (without further description) to B., for four hundred dollars—*Held*, that A. resigned all his claim to the "Cedar Cabin" tract of land. *Cravens v. Pettit*, xvi. 210.

7. A deed described the land conveyed as "part of lot number three, which is more particularly known as the lot or part of lot on which the Hannibal hotel stood"—*Held*, that it was sufficient to pass all the land on which the hotel stood, although it covered part of lot three and part of an adjoining lot. *Bates v. Bower*, xvii. 550.

8. Where land conveyed is sufficiently described by metes and bounds, the grantee takes all within them, whether it be more or less than the quantity stated in the deed. *Marshall v. Bompart*, xviii. 84.

9. The description in a deed was thus, "a tract of land eight arpents front upon the depth of forty, and as the same exists according to the line of the figurative plan"—*Held*, that such deed did not convey the specific land claimed without extrinsic proof of locality. *Vasquez v. Richardson*, xix. 96.

10. The description in a deed referred to a survey of the land in dispute, and but one survey of it was given in evidence—*Held*, that the description must be taken as a matter of law to refer to that survey, when using the words, "as designated on the plat of survey of said town." *Menkins v. Blumenthal*, xix. 496.

11. Where a lot of land was described in a deed, and stated to be included in the "south-east" corner of a larger tract, and the grantee took possession of a similar tract in the south-west corner of the larger tract, and it appeared from the evidence that this was intended, it was *held*, that the word "south-east" might be rejected from the description, and the land located according to the rest of the description and the evidence. *Evans v. Greene*, xxi. 170.

12. A deed in which the interest conveyed is described thus: "all the right, title, interest and estate which we, or either of us have, or may have, to a certain tract of land, which the said Louis Lemonde, now deceased, but formerly resident, &c., acquired, or claimed to have acquired of Auguste Conde, formerly of St. Louis, now deceased, and which land was supposed to have been situated in the Grand Prairie, in said County and State, but for which land said parties of the first part have never seen any deed from said Auguste Conde to said Louis Lemonde," is not, upon its face, void for uncertainty. *Hogan v. Page*, xxii. 55.

13. Calls for boundaries may be controlled by other words of description in a deed. *McCune v. Hull* xxiv. 570.

14. A deed conveyed all the interest of the grantor in his father's estate or lands "near St. Louis"—*Held*, that it might be shown that the father possessed land nearer St. Louis, and more appropriately within the description of the deed

from the son, than that sought to be comprised within it. *Menkens v. Blumenthal*, xxvii. 198.

15. A division line located by mistake, and agreed upon by adjoining proprietors, will not be held binding and conclusive upon them, if injustice be not done by disregarding it. *Ibid.*

16. Where there is a palpable omission in the description of a deed, it may be supplied by construction. In the absence of calls for specific objects or other controlling calls, the course will control. *Hoffman v. Riehl*, xxvii. 554.

See EVIDENCE, 55 ; . . . EXECUTION, 130, 134, 135, 137.

II. IN EJECTMENT.

17. In a declaration in ejectment, the description of the demanded premises must be such as to enable the jury to identify them with the premises described in the deeds on which the plaintiff relies to sustain his title. *Newman v. Lawless*, vi. 279.

18. The plaintiff brought ejectment for the N. W. fr. qr. § 35, T. 49, R. 17, and offered in evidence, a deed, through which he claimed title, which described the land conveyed as an "interest in the S. E. fr. qr. of fr. § 35, T. 49, R. 17, including part of the town of Booneville," &c., and in connection with the deed, offered to prove that the north-west quarter of the section was fractional, and was the only fractional quarter in the section, and that part of the town of Booneville was situated upon it, and that no part of the town was situated on the south-east quarter—*Held*, that the evidence was properly excluded, that the description in the deed by metes and bounds, as surveyed and numbered under the acts of Congress, is the particular and leading description, and is sufficient to ascertain the premises, and the balance of the description should be rejected. *Hartt v Rector*, xiii. 497.

See EJECTMENT, 15.

III. CONFIRMATION.—See PUBLIC LANDS.

See EVIDENCE, 58 ; . . . EXECUTION, 80–83 ; . . . FORCIBLE ENTRY AND DETAINER, 29 ; . . . FRAUDS AND PERJURIES, 6 ; . . . PUBLIC LANDS, 92–108.

BREACHES OF THE PEACE.

I. CIVIL ACTION.

II. CRIMINAL PROCEEDINGS.

- a. INDICTMENT AND WHEN IT LIES.
- b. DEFENSE.
- c. COSTS.
- d. APPEAL.
- e. WRIT OF ERROR.
- f. VERDICT.
- g. JUSTICE'S TRANSCRIPT.

I. CIVIL ACTION.

1. Where the declaration in an action for an assault and battery contains but one count, and a plea of *son assault demesne* is put in and sustained, the plaintiff will not be permitted to give evidence of another assault. *Peyton v. Rogers*, iv. 254.

2. In an action of assault and battery, no matter of provocation can be given in evidence, unless it be so recent as to create a fair presumption that the violence was done under the influence of the passion excited by it. *Coxe v. Whitney*, ix. 527. *Collins v. Todd*, xvii. 537.

3. Nor can the defendant, after proving the plaintiff's statements as to its origin, made immediately after the difficulty, prove his own statements in reply. *Ibid.*

4. In a civil suit for damages, the record of an indictment for the same offense, to which the defendant pleaded guilty, is admissible in evidence. *Corwin v. Walton*, xviii. 71.

5. And the plaintiff may recover exemplary damages, notwithstanding the defendant was convicted and fined in the criminal prosecution. *Ibid.*

6. Several parties engaged in an assault and battery, may be sued jointly or separately; but if sued separately, the plaintiff will be put to his election between the judgments, since there can be but one satisfaction. *Page v. Freeman*, xix. 421.

7. An instruction allowing "smart money," in case of assault and battery, is erroneous. *Mooney v. Kennett*, xix. 551.

II. CRIMINAL PROCEEDINGS.

a. INDICTMENT AND WHEN IT LIES.

8. Since the act of February 3, 1837, (Acts 1836-7, 63,) relating to fines, &c., assaults and batteries are indictable offenses. *Swearingen v. The State*, v. 329.

9. Under the act (1 Ter. L. 216, § 27) which provides that "if any person shall unlawfully assault or threaten another," &c., "he shall on conviction be fined," &c.—*Held*, that the object of the act being, not to define the offense, but to prescribe the punishment, it is not necessary, in an indictment for assault and battery, that the word "unlawfully" should be used. *State v. Bray*, i. 180.

10. Nor is the use of such word necessary in an indictment for riot under the statute (R. S. 1835, 202, § 6.) It is sufficient to show an unlawful act done. *McWaters v. The State*, x. 167.

b. DEFENSE.

11. An acquittal on an indictment for a felonious assault will not bar a prosecution before a Justice for a simple assault and battery; but where the complaint made before the Justice charges an indictable offense above the grade of an assault of which he has jurisdiction, an acquittal upon an indictment for the same felony is a bar to a further prosecution on such complaint. *The State v. Wightman*, xxvi. 515.

12. Persons indicted for assault and battery cannot be acquitted because the proof shows that they were guilty of a riot, as well as assault and battery. *Calloway v. The State*, i. 211.

C. COSTS.

13. Where a person who has entered into a recognizance to keep the peace, and to appear before the court, is discharged by reason of the failure of the prosecutor to appear, costs should not be adjudged against him but against the prosecutor. *The State v. Fawcett*, xvi. 380.

14. But the criminal court may adjudge costs at its discretion against a party who appears before it under a recognizance to keep the peace, although he is not required to enter into any further recognizance, and the Supreme Court will not interfere. *The State v. Hoffman*, xviii. 329.

D. APPEAL.

15. In prosecutions before a Justice for assaults, &c., under the acts of February, 1825, (R. S. 1825, 139,) and January, 1831, (2 Ter. L. 271,) the defendant must appeal on the day of trial, if at all, as an appeal on a subsequent day is void. *The State v. Epperson*, iv. 90.

16. And such appeal under the statute (R. S. 1835, 374, §§ 15, 22,) must be perfected on the day of trial. The appeal is not governed by the statute relating to Justices' Courts in civil cases. *Cox v. The State*, ix. 180. *Thomas v. The State*, x. 235.

17. An affidavit for an appeal from the judgment of a Justice, on a conviction for assault and battery, stating that the appellant believed he was "injured," instead of "aggrieved," as prescribed by the statute, (R. S. 1845, 674, § 15,) is sufficient. *Manion v. The State*, xi. 578.

18. A party who appeals from a conviction and fine before a Justice, and enters into the recognizance required by statute, need not appear in person in the appellate court. It is error to affirm the judgment of the Justice upon his failure to do so. *The State v. Buhs*, xviii. 318.

E. WRIT OF ERROR.

19. Every citizen of this State has by law a right to have a judgment rendered against him reviewed by the superior tribunal,—a writ of error, therefore, will lie in a criminal prosecution for an assault and battery. *Calloway v. The State*, i. 211.

F. VERDICT.

20. The statute (R. S. 1855, 1196, § 5) is not applicable to prosecutions for assault and battery commenced before a Justice; the jury should assess the fine as provided in § 11 of the statute relating to breaches of the peace. *The State v. Warne*, xxvii. 418.

G. JUSTICE'S TRANSCRIPT.

21. Where a Justice takes a recognizance to keep the peace, he is required

to transmit to the clerk of the upper court only the recognizance, and not the affidavit and warrant. *The State v. Emintz*, xxvii. 521.

See DAMAGES, 7 ; . . . JURISDICTION, 15, 47 ; . . . LAWS, 20, 60 ; . . . TRESPASS, 32.

BRIDGES.

1. Secs. 16 and 17 of the act in relation to bridges (R. S. 1845, 195) give a cumulative remedy, and do not affect the right of action on the bond, which may be sued upon without demand or notice. *Gathwright v. Callaway County*, x. 663.

2. An obligation to build and keep in repair a bridge, for a given period of time, binds the obligor to rebuild in case it is destroyed by a flood within that time. *Ibid.*

3. The measure of damages for not rebuilding in such a case, is the cost of rebuilding and the expense of insurance for the residue of the time. *Ibid.*

CERTIORARI.

1. On a *certiorari* from a Justice, where the proceedings are set aside for irregularity, the Circuit Court cannot try the cause *de novo*, if the statement of the plaintiff originally filed before the Justice was not sufficient to give jurisdiction of the action. *Cook v. Callaway*, i. 545.

2. On a *certiorari* from a Justice, the proceedings before him cannot be set aside except for irregularity appearing in those proceedings, on the docket, and in the writ or writs issued by the Justice. *Huston v. Orr*, i. 582.

3. When a writ of *certiorari* and the record are in court, a Justice may amend by connecting them by the addition of proper words. *Hill v. Young*, iii. 337.

4. The Circuit Court has no power to issue a writ of *certiorari* to bring up proceedings had before a Justice, after trial there. *Boren v. Welty*, iv. 250.

5. As to the proper office and functions of a writ of *certiorari*, and the issuing of such writ from the Supreme Court. *Hannibal and St. Joseph R. R. Co. v. Morton*, xxvii. 317. See APPEAL, 78 ; . . . CRIMINAL LAW, 273 ; . . . FORCIBLE ENTRY AND DETAINER, IV ; . . . JURISDICTION, 8 ; . . . PRACTICE, 12 ; . . . PRACTICE IN SUPREME COURT, 28.

CHANCERY.

I. JURISDICTION.

a. GENERALLY.

b. CONTRACT.

aa. Relief against.

bb. Reforming.

cc. Mistake.

dd. Specific Performance.

- c. CONTINGENCIES.
- d. CONTRIBUTION.
- e. FORFEITURES AND PENALTIES.
- f. FRAUD.
- g. JUDGMENTS AT LAW.
- h. LIMITATIONS.
- i. MARKETABLE TITLES.
- j. NUISANCE.
- k. PARTITION.
- l. QUIETING TITLES.
- m. REMEDY AT LAW.
- n. SHERIFF'S DEED.
- o. TRUSTS.
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II. INJUNCTION.

- a. GENERALLY.
- b. COLLECTION OF TAXES.
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III. PLEADING.

- a. BILL.
 - aa. Form and Sufficiency.
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 - cc. Parties.
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 - ee. Bill of Interpleader.
 - ff. Bill of Review.
- b. ANSWER.
- c. PLEA.
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- e. SPECIAL REPLICATION.

IV. PRACTICE.

- a. GENERALLY.
- b. DISMISSAL.
- c. EVIDENCE.
- d. SEQUESTRATION.
- e. TRIAL BY JURY.
- f. BILL OF EXCEPTIONS.

V. DECREE.

- a. GENERALLY.
- b. WHEN TAKEN.
- c. PROVISIONAL.
- d. VOIDABLE.
- e. SETTING ASIDE.

I. JURISDICTION.

a. GENERALLY.

1. Where there are mutual engagements, entirely independent of each other, the non-residence or insolvency of a party is an auxiliary ground of jurisdiction.
Per NAPTON, J. *Overton v. Stevens*, viii. 622.

2. Equity is not confined, in its jurisdiction, to cases in which adequate relief cannot be had at law. The 5th clause of § 8 of the act establishing courts (R. S. 1835, 155,) was not intended to restrict the jurisdiction of courts of equity, nor to take away any of their powers. *Clark v. Henry*, ix. 336.

3. It does not follow that because a court of law has jurisdiction, that a court of equity has not, since the two jurisdictions are sometimes concurrent. *Berry v. Robinson*, ix. 273.

4. Where a court of equity has jurisdiction of a subject, its authority over it is not lost by reason of a concurrent jurisdiction being conferred upon another tribunal. *Dobyns v. McGovern*, xv. 662.

5. Where jurisdiction of a cause is obtained for one purpose, the court may proceed with the whole case, and decide it upon its merits. *Keeton v. Spradling*, xiii. 321.

6. A. died, leaving a will, and letters of administration were granted, with the will annexed, to the complainant and the widow of the testator, who took possession of the entire estate, the complainant merely aiding with his advice. After her death, B., one of the defendants, was her executor and residuary legatee. A legatee under the will of A. brought his bill in equity against the complainant, and made B. and others defendants, and obtained a decree—*Held*, that the legatee was clearly entitled to satisfaction from the personal representatives of A., and that the decree in his favor was conclusive of the amount of his legacy; that the complainant, who was compelled to pay the legacy, had an equitable claim for it on the administratrix of A., and, since her death, on her executor; and that the complainant is not concluded by the fact that one of the present defendants was made a co-defendant with him in the suit brought by the legatee, since he was improperly joined therein, and it does not appear that the same matters were litigated in that suit. *Richardson v. Adams*, iv. 311.

7. A lost bond may be sued on in Chancery, and the subsequent finding of it will not divest the court of its jurisdiction. *Miller v. Wells*, v. 6.

8. The complainant had a judgment against one Hamilton. Myers, who resided out of the State, was indebted to Hamilton, and one Huntington, a resident of this State, was indebted to Myers—*Held*, that Chancery had no power to compel Huntington to pay the debt due from Hamilton to complainant. *Jones v. Huntington*, ix. 247.

9. A party who advances money on the faith of property in the possession of one who has the legal title thereto, without any knowledge of the rights of others, will be protected in equity. *Block v. Chase*, xv. 344.

10. Where a sale of real estate of a decedent has been made under an order of the court, for the payment of the debts of the estate, upon a petition of the administrators, and the sale has been approved by the court, but the administrators have refused to make a deed of the land sold, a court of equity has no authority to compel the administrators to make such deed to the purchaser, nor can it, by its decree, vest the title in the purchaser. *Speck v. Wohlien*, xxii. 310.

11. Where a purchaser of land accepts from his vendor a conveyance, with full warranty of title, there being no fraud in the sale, and the possession of the purchaser remaining undisturbed, he cannot be relieved against the payment of

the purchase money on the mere ground of a defect of title. *Connor v. Eddy*, xxv. 72.

b. CONTRACT.

aa. *Relief against.*

12. Inadequacy of price, coupled with circumstances which show oppression or command over the maker, will be regarded as a fraud upon him, and entitle him to relief in equity. But mere inadequacy of price does not furnish ground for such relief. *Holmes v. Fresh*, ix. 200.

13. Nor does it, when unconnected with circumstances of unfairness, over-reaching or oppression, furnish any objection to enforcing the specific performance of a contract, where the parties stand upon an equality, with equal means of information, and not in any confidential relation, and where no artifice is practiced. *Harrison v. Town*, xvii. 237.

14. Where the contract is between parties competent to contract, in relation to which no improper concealment or false representation is made, and no undue influence is exercised by one party over the other, it will not be relieved against. *Tison v. Labeaume*, xiv. 198.

15. A conveyance obtained without sufficient consideration, from a man of weakened intellect, by a person who has influence over him, and who practices upon his passions, will be set aside. *Freeland v. Eldridge*, xix. 325.

bb. *Reforming.*

16. Where a contract is not expressed in such terms as to have the effect the parties intended, it is the duty of a court of equity to reform it; and it is not material whether the instrument is an executory or an executed agreement, nor is it material whether the proceeding is directly by bill, to correct the mistake, or the mistake is set up in the answer by way of defense. *Leitensdorfer v. Delphy*, xv. 160.

17. The reformation of a written agreement on the ground of mistake will be decreed only where the proof of the mistake is clear and satisfactory; the petition should state the terms of the contract, as sought to be corrected, with certainty. *Able v. Union Ins. Co.*, xxvi. 56.

cc. *Mistake.*

18. A conveyance will not be set aside on the ground of mistake, unless the fact that a mistake was committed is clearly established. *Tombs v. Tucker*, vi. 16.

19. An over-payment, occasioned by a mistake in the calculation of interest, in a settlement, will be relieved against in equity. *Boon v. Miller*, xvi. 457.

20. A. B. and C. (A. and B. having husbands living) owned land in co-parcenary, and an amicable partition was made, and equal shares allotted. In making mutual conveyances to perfect the partition, B. and her husband and C. conveyed to A.'s husband instead of to A. herself; and the deeds of A. and her husband to B.'s husband and to C. were so acknowledged as to pass only the life interest of the husband—*Held*, in a suit by A. against the heirs of her deceased husband,

that there was no equity in her favor to obtain a divestiture of the title that descended to the defendants from the husband of the plaintiff. *Pensenneau v. Pensenneau*, xxii. 27.

dd. *Specific Performance.*

21. A. sold to B. certain lands, and gave him a bond, conditioned to make title thereto within three years. The consideration was \$1000 cash, and four pieces of real estate, to be conveyed to A., one of which was not conveyed, and the title to another failed. A. could make title to only a small part of the land within the three years, and B. sued and recovered on A.'s bond. Afterwards, about two years subsequent to the forfeiture of the bond, A., having perfected his title to the whole, filed his bill for a specific performance, and for an injunction to stay proceedings on the judgment—*Held*, that time was a material element in the contract, and that, in order to entitle A. to be relieved from the bond, he must show, not only that B. could be placed in as good a situation as he would have been if the contract had been fulfilled in time, but that he, A., was desirous and diligent to perform his agreement, and was prevented by obstacles such as he could not, by active and well-directed diligence, surmount; that B., having purchased the land, not in separate parcels, but as one entire quantity, there could not be a decree, *pro tanto*, as to the small part of the land to which A.'s title was complete, in and for which he had, in time, tendered B. a deed; and that A. should repay the \$1000 cash, with interest, and the value of two of the tracts received as part payment from B., to which the title was good, with interest, and that the injunction should be perpetual as to all the rest of the judgment recovered on the bond. *Rector v. Price*, i. 373.

22. Mere inadequacy of price, unaccompanied with fraud, is no ground for refusing a decree for a specific performance, although fraudulent suggestions, or suppression of material facts, would be. *Bean v. Valle*, ii. 126.

23. An attorney for the plaintiff in execution purchased at sheriff's sale, and, after some months, sold to A., in order to raise the money for his clients. A. gave his bond to convey the property to the defendant in execution in consideration of certain sums paid down, and other sums to be paid at specified times, conditioned to be void on a failure to pay as specified. The defendant failing to pay the money, applied to B., who advanced it for him, and took a conveyance to himself, and gave a similar bond. Again failing to raise the necessary sums to entitle himself to a conveyance, the defendant applied to C., and, at his request, B. conveyed to C., who gave the defendant a written promise that, on the payment of a specified sum on a certain day, he would convey to him—*Held*, that, after the lapse of the time agreed on, the defendant has no claim in equity for a specific performance of the contract, and consequently that his creditors have none. *Russell v. Geyer*, iv. 384.

24. A specific performance of a contract is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances of the case. If there has been unfairness, or want of good faith, or improper conduct of any kind on the part of the party asking the aid of the court, a specific performance will not be decreed. *Durrett v. Hook*, viii. 374.

25. As to specific performance and opening of settled accounts. *Moore v. McCullough*, viii. 401.

26. A parol contract for the conveyance of land may be discharged by parol. Thus, where a son bargained to his father a parcel of land, and the father paid the purchase money, and went into possession, and cultivated and improved the land for twenty-two years, steadily refusing a deed, (although the son repeatedly expressed his willingness to convey,) and died eight years after the death of the son, without taking any measures to procure the legal title, leaving a valuable estate, it was held that these circumstances, coupled with others of like tendency, were sufficient to show a waiver, and discharge of the contract of sale. *Tolson v. Tolson*, x. 736.

27. A contract for the conveyance of a quantity of land valued at a given sum, out of any land the obligor might own, will not be enforced. A specific performance will only be decreed where a specific thing is agreed to be done. *Shelton v. Church*, x. 774.

28. Specific performance will not be decreed, except in cases where it is strictly equitable, and he who does inequity shall not have equity. *Per Scott, J. Southworth v. Hopkins*, xi. 331.

29. The payment of the purchase money, the delivery of possession, and the making of valuable improvements, entitles the bargainee to the specific performance of a contract for the conveyance of real estate. *Johnson v. McGruder*, xv. 365.

30. A vendor of land executed a bond conditioned to convey at a specific time after the payment of the last instalment—*Held*, that the title was retained as security for payment of the whole purchase money. And the vendee, under such an agreement, cannot obtain a specific execution of the contract to convey, without paying the purchase money. *Delassus v. Poston*, xix. 425.

31. The statutory proceeding against an administrator (R. S. 1845, 88, §§ 36–42,) to enforce the specific performance of an agreement by his intestate to convey land, is permitted only where the contract is in writing. *Schulters v. Bockwinkle*, xix. 647.

32. It is a rule in equity, that, where one party to a contract has been placed in such a situation by a total or partial performance, that it would be a fraud on him if the contract was not fully executed; then equity will interfere, notwithstanding the statute of frauds. *Farrar v. Patton*, xx. 81.

33. Where a party has made a parol contract to convey a certain piece of land to another, and afterwards conveys it to a third person having notice of the parol contract, the third party, in a suit for specific performance, stands precisely in the situation of his grantor. *Ibid.*

34. A suit for the specific performance of a contract to convey land, cannot be maintained on the sole ground of a part payment of the purchase money. *Parke v. Leewright*, xx. 85.

35. Or of valuable improvements on lands contracted for, not made with the expectation that the contract would be fulfilled. *Ibid.*

36. Where the plaintiff knew, when he filed his bill for the specific performance of a contract, that the defendant could not perform it, equity will not decree

damages for non-performance, but leave the plaintiff to his remedy at law *McQueen v. Chouteau*, xx. 222.

37. Where a party, claiming to be the purchaser of land under a parol contract, had taken possession, made valuable improvements, and the alleged vendor had accepted part-payment for the premises, it was held that the purchaser was entitled to a specific performance. *Despain v. Carter*, xxi. 331.

38. Specific performance of a contract to convey land will not be decreed where the title is not in the party contracting to convey. *Brueggeman v. Jurgensen*, xxiv. 87.

39. Where there has been a part-performance of a parol contract for the sale of land, and the vendor puts it out of his power to specifically perform his contract, by selling the land to a *bona fide* purchaser, without notice, equity will entertain jurisdiction of a bill for damages. *Lee v. Howe*, xxvii. 521.

See *INFRA*, 119, 142, 203.

C. CONTINGENCIES.

40. Where contingencies are so remote that they may never happen, equity sometimes grants relief. *Per* *NAPTON, J. Peery v. Cooper*, viii. 205. .

D. CONTRIBUTION.

41. A., owning several parcels of land subject to the lien of judgments, executed a bond to convey one of them to B., by deed of general warranty. Before B. caused the bond to be recorded, an execution from another county was placed in the hands of the sheriff, and levied on the other parcels, and they were sold, and C. became the purchaser. Afterwards and before B. paid the purchase money, executions upon the judgments first named were levied on the tract sold to B., and it was sold, B. buying it in—*Held*, that B. could not maintain an action in chancery against C. for contribution. If C. is liable to any one in such an action, it is to A. *Ingram v. Tompkins*, xvi. 399.

E. FORFEITURES AND PENALTIES.

42. A court of equity never lends its aid to enforce a forfeiture. *Messersmith v. Messersmith*, xxii. 369.

43. Nor to collect a penalty—thus, where a bond was given bearing six per cent. interest, and a mortgage to secure its payment, in which was a proviso, that, if the payments were not punctually made, it should bear four per cent. additional interest, a bill to foreclose for the four per cent. penalty, for a failure to make punctual payments, will not be sustained. *Watts v. Watts*, xi. 547.

44. Nor will it relieve a party against a forfeiture, where he has been in gross default. *Broadbush v. Ward*, viii. 217.

45. Where there is a breach of an express condition in a deed, the remedy of the grantor is by an entry, and a suit at law, if necessary to recover the possession; and the remedy of the grantee, or his heirs, is by a suit in equity to be relieved against the forfeiture, upon making a just compensation, if a proper case for equitable relief exists, or perhaps by setting up this matter as a defense

when sued at law for the possession. *Per* LEONARD, J. *Messersmith v. Messersmith*, xxii. 369.

46. A mother conveyed land to her son, upon an express condition inserted in the deed, that he should provide for her maintenance during her natural life. The son, having maintained his mother for many years, died without making any provision for her by will or otherwise, but leaving ample means for her maintenance, which his representatives offered to apply to that purpose—*Held*, that if there was any breach of the condition, it was a proper case for equitable relief against a forfeiture. *Ibid*.

f. FRAUD.

47. Where, on a bill to set aside a deed as fraudulent, a sale of the land is decreed, a purchaser under the decree is not affected by the fraud in the deed. *Jones v. Talbot*, ix. 120.

48. Nor would it make any difference that the decree of sale was obtained by fraud and collusion, the purchaser not being a party to the fraud. *Ibid*.

49. Where a father fraudulently, as to his creditors, conveyed land to trustees for the benefit of two of his children, his heirs cannot, in equity, set aside such conveyance on the ground of the fraud. *Ober v. Howard*, xi. 425.

50. An assignment of a certificate of entry of public land may be set aside in equity, when shown to be procured by fraud, and by taking advantage of the assignor's intoxication. *Phillips v. Moore*, xi. 600.

51. A. died, leaving a widow and one son. He left all his estate by will to them. On the same day the will was executed, he also executed to his son a deed of five slaves, being a large portion of his property. On A.'s death, his widow renounced the provisions of the will, and claimed dower not only in the real estate, but also in the five slaves conveyed to the son, and applied in chancery for relief—*Held*, that the powers of the County Court were not adequate to grant the relief asked for, and that the allegation that the deed was fraudulently made for the purpose of defeating the widow's right of dower in the slaves, gave jurisdiction to the Court of Chancery. *Davis v. Davis*, v. 183.

52. P. purchased a parcel of land of G., for which he paid \$50 cash, and gave his note for \$300 more, and at the same time, executed to G. a bond to re-convey the land to him in case the \$50 was repaid, and the \$300 note delivered back on a certain day. G., to evade his creditors, fraudulently assigned the note to a brother of his. P. was then garnisheed, and judgment ultimately obtained against him as G.'s debtor on the note, which, in the meantime, and before it was due, had come to the possession of the complainant by purchase, who tendered the note and the \$50 to P., and brought his bill in equity to compel a conveyance of the land to him—*Held*, that as it appeared that he had knowledge of the whole transaction and of its fraudulent character, he had no right to the aid of chancery. *Steele v. Parsons*, ix. 813.

53. Notice by *lis pendens* can exist only after service of process; nor would a purchaser, *pendente lite*, be affected by such a notice if the suit, during the pendency of which he made his purchase, should be afterward abandoned. *Herrington v. Herrington*, xxvii. 560.

See FRAUD, III.

g. JUDGMENTS AT LAW.

54. Equity has jurisdiction of a cause where an executor is charged with waste in not accounting for property which had come into his hands, although a final settlement had been made in the County Court. *Clark v. Henry*, ix. 336.

55. So, also, under the statute (R. S. 1825, 410, § 3,) to set aside judgments on bonds given for a gaming consideration. *Collins v. Lee*, ii. 16. But this applies only to judgments by confession. *Wilkerson v. Whitney*, vii. 295.

56. Chancery will not interfere with a judgment at law in regard to matters properly within the jurisdiction of the court, although the party may have been led into error by the suggestion of such court. He takes the advice of the court at his peril. [OVERRULING *Risher v. Roush*, i. 702.] *Risher v. Roush*, ii. 95.

57. Judgments at law will not be opened or set aside, except for fraud, or to relieve grievous hardship, not otherwise remediable. They will not be opened to prove a payment which the complainant neglected to establish in the trial at law; nor will testimony which was submitted to a jury be examined to ascertain on what principles the verdict was founded. *Sumner v. Whitley*, i. 708. *Collier v. Easton*, ii. 145. *Yantis v. Burdett*, iii. 457.

58. Nor will a judgment at law be restrained for causes which, on a motion for a new trial, were held insufficient. *Matson v. Field*, x. 100.

59. Nor relieved against where it was recovered against H. upon a note executed to N. C., where H.'s defense is that, from the similarity of names, he thought it the same note he had executed to J. C., and that the consideration of the note to N. C. had failed. Such negligence does not merit the aid of chancery. *Head v. Pitzer*, i. 548.

60. A. sold to B. certain lands, and received part payment and B.'s obligation for the remainder, and executed a deed to B., containing a covenant of general warranty, and also the words "grant, bargain and sell," which, by law, import a covenant of seizin, and also a covenant for quiet enjoyment. A. sued and recovered judgment on B.'s obligation; and B. filed his bill, setting forth that A. had no title to the land, and praying an injunction against the judgment—*Held*, that B., having a complete remedy at law on A.'s covenants, the injunction should extend no farther than to stay proceedings on the judgment until B. could seek his remedy at law; and that to entitle him to that, he should show, in the first place, such facts as will induce the interference—such as A.'s insolvency, and that B. has used all proper diligence in prosecuting his remedy at law. *Swain v. Burnley*, i. 404.

61. The complainant and one Y. executed their note to the defendant, on which Y made a payment. The defendant then sued the complainant alone on the note in Kentucky, where he obtained judgment, without giving credit for the full amount paid by Y. He took out execution, which was satisfied in part, and the balance was levied on property claimed by one B., who took it into his own possession on executing a replevin bond, by which he was bound to pay its value if the decision as to the right of property was against him. Before the right of property was determined, the complainant removed to this State and was here sued on the Kentucky judgment, and judgment obtained thereon without any

credits; and it was decreed that the defendant should have his judgment obtained in this State, and damages on the part enjoined (deducting credits,) to be paid to him on his assigning to the complainant his interest in the replevin bond, the complainant paying the costs thereon. *Yantis v. Burdett*, iv. 4.

62. Judgment was recovered against two, as the makers of a note, one of whom was surety merely. Execution was levied on land of the principal, but was stayed until the statutory lien expired, and the principal had become insolvent. It did not appear that the plaintiff knew that one of the defendants was a surety merely—*Held*, that there was no ground to enjoin execution against the surety. *Patterson v. Brock*, xiv. 473.

63. The County Court, having jurisdiction to enter a judgment sought to be enjoined, there is no authority to enter into an examination of its merits. An injunction is a release of errors at law, and the proceedings on it are not appellate in their nature. *Price v. Johnson County*, xv. 433.

64. A creditor at large who has sued by attachment, but has not obtained a judgment, is not entitled to the equitable interference of the courts to annul judgments fraudulently confessed by his debtor, in favor of other persons, or to restrain, by injunction, the disposal of the debtor's property upon executions issued on such judgments. *Martin v. Michael*, xxiii. 50. [See *Wintringham v. Wintringham*, 20 *Johns. Rep.*, 296.]

65. The complainant purchased of R., one of the defendants, certain premises, paying a part of the purchase money in cash, and the balance in his notes, R. covenanting to convey by deed of general warranty, as soon as the payments were completed. The complainant did not take possession of the premises, and was aware, at the time of the purchase, that they were under incumbrances, upon which they were subsequently sold. R. became insolvent, and assigned the notes to other parties, who obtained judgments on them against the complainant—*Held*, that chancery, on the ground of the total failure of consideration, would perpetually enjoin the judgments, and decree a cancellation of the notes, and a return of the purchase money paid by the complainant. *Barton v. Rector*, vii. 524.

h. LIMITATIONS.

66. Lapse of time, short of the statute period, will not prevent a court of equity from interfering to divest a legal estate which has been conveyed by a trustee, by direction of an infant beneficiary, exercising a power of appointment. *Thompson v. Lyon*, xx. 155.

67. Though ordinarily no limitation operates in favor of a trustee, yet, where time and long acquiescence (in this case fifteen years) have obscured the nature and character of the trust, or the acts of the parties, or other circumstances, give rise to presumptions unfavorable to its continuance, a court of equity will refuse relief, upon the ground of lapse of time and its inability to do complete justice. *RYLAND, J., dis.* *Taylor v. Blair*, xiv. 437.

68. If two persons, one of whom is barred and the other not, join in a bill for relief, the one not barred cannot obtain it. In such case, the court gave the plaintiffs an opportunity to amend. *Keeton v. Keeton*, xx. 530.

i. MARKETABLE TITLES.

69. The doctrine of marketable titles is purely equitable. *Kent v. Allen*, xxiv. 98.

j. NUISANCE.

70. The jurisdiction of the court of equity, in cases of nuisance, is undoubted, although not often exercised. *Per* SCOTT, J. *Welton v. Martin*, vii. 307.

k. PARTITION.

71. A court of chancery has no power to decree a partition of personal chattels between joint tenants or tenants in common. *Gudgell v. Mead*, viii. 53.

l. QUIETING TITLES.

72. Where a valid objection appears upon the face of a record of legal proceedings, by force of which proceedings the complainant has title to his property, he is entitled to relief in equity to remove the cloud from his title; but where no legal objection appears, it is otherwise. *Gamble v. City of St. Louis*, xii. 617.

73. One owning an undivided half of a lot of land, his children owning the other half, conveyed the Eastern half to his daughter E., and by will devised the Western half to another daughter, T. E. in many ways acknowledged the validity of the will. A proceeding was brought by T. in the nature of a bill *quia timet*, that she might be quieted in her title to the Western half devised to her—*Held*, that such a proceeding was not maintainable. *Taylor v. Ulrici*, xix. 89.

m. REMEDY AT LAW.

74. Equity will not relieve where the party had his defense at law and failed to avail himself of it, and no excuse is shown for such failure. The allegation "that the best defense in his power was made" at law, is not sufficient to give equitable jurisdiction. *Cadwalader v. Atchison*, i. 659. *Matson v. Field*, x. 100.

75. But where a defense is of such a character that it may be made either at law or in equity, chancery will give relief, although the party has neglected his defense at law. *Per* NAPTON, J. *Overton v. Stevens*, viii. 622. *Ramsey v. Ellis*, i. 402. (See 9 *Ves.* 464—17 *John.* 388.)

n. SHERIFF'S DEED.

76. A sheriff's deed may be impeached and set aside for fraud, by a proceeding in chancery. *Teubner v. Moller*, xii. 528.

77. Where a sheriff's deed is not sealed, a court of equity will not aid the imperfect execution. Chancery does not carry into effect the incomplete execution of statutory powers. *Moreau v. Detchemendy*, xviii. 522. *Moreau v. Brankham*, xxvii. 351.

78. And the court should not presume such a deed to be sealed against the express admission, in an answer, of the party invoking such a presumption, that the sheriff omitted, by mistake, to seal it. *Moreau v. Brankham*, xxvii. 351.

79. Where, under the act of 1807, (1 Ter. L. 120, § 45,) a sheriff's deed was not acknowledged in court, it was ineffectual to pass title to the purchaser, and the authority of the sheriff, being statutory, should have been strictly pursued. The court cannot aid such imperfection. *Allen v. Moss*, xxvii. 354.

O. TRUSTS.

aa. Generally.

80. If a trustee becomes the purchaser at his own sale, and immediately sells to another at an advance, according to a previous arrangement that such other should not bid at the sale, equity will compel him to account for the advance to the *cestui que trust*. *Wasson v. English*, xiii. 176.

81. A legal right, acquired in the prosecution of a lawful demand, in a lawful way, will not be disturbed in equity, unless some trust, confidence, agreement or relationship, imposing an obligation, has been violated. *McCourtney v. Sloan*, xv. 95.

82. A trustee, having reasonable doubt as to the proper disposition to be made of funds in his hands, may apply to a court of equity for directions, making the persons interested parties to the proceeding. *Hayden v. Marmaduke*, xix. 403.

83. A., who held the legal title to certain real estate, died, and left his brothers and sisters as his heirs. After his death, B., one of his brothers, claiming that A. had held the title in trust for him, conveyed the property to C., and received part of the purchase money. D., one of the heirs, refused to execute a deed. C. filed a petition against D. and the other heirs, the object being to get the title to the property and compel the defendants to interplead for the balance of the purchase money—*Held*, that such a proceeding could not be maintained under the new code. *Carrico v. Tomlinson*, xvii. 499.

bb. To secure a Debt.

84. Chancery has jurisdiction to control the acts of trustees, under a deed of trust, to secure the payment of money; and, where his powers are not strictly pursued, will set aside his sales. *Stine v. Wilkson*, x. 75.

85. In a bill for an account and for a conveyance of the residue of lands held in trust to secure a debt, it is not necessary to tender the money, nor to offer to redeem. *Ulrici v. Papin*, xi. 42.

86. Where the trustee in a deed of trust died, and a bill was filed to have a trustee appointed, and the land sold, the complainant must do equity, and if he have refused to comply with the condition upon which the deed was obtained, equity will not lend its aid to enforce his claims. *Fresh v. Million*, ix. 311.

87. An unsealed instrument, which assumes to convey land in trust to secure the payment of a debt, is not sufficient, *per se*, to authorize a sale and conveyance by the trustee. But such an instrument creates an equitable lien, which a court of equity will enforce. *Linton v. Boly*, xii. 567.

88. The holder of a second deed of trust on real estate, the notes of which are not due, cannot, in a court of equity, compel the holder of a prior deed which is

over-due, to submit to a redemption and assignment to him. *How v. Graham*, xxi. 163

P. WILL.

89. A court of equity has no jurisdiction to reform a will on the ground of mistake by the draughtsman in drawing it. *Goode v. Goode*, xxii. 518.

90. Where a will makes the consent of the executor necessary to give validity to a sale by the widow of the testator, having the power of disposal for the benefit of herself and children, and a merely selfish reason induces the executor to refuse his consent, a court of equity will, on application, authorize a sale. *Norcum v. D'Ench*, xvii. 98.

II. INJUNCTION.

a. GENERALLY.

91. The Supreme Court has no power to grant injunctions. *Lane v. Charles*, v. 285.

92. An injunction will not be granted to restrain a trespass, unless the trespasser be insolvent, or the injury irreparable. *James v. Dixon*, xx. 79.

93. Damages are recoverable from one who, in building a house, has inserted the ends of the joists into his neighbor's wall without license; but an injunction to remove the joists will not be granted, unless special facts are shown requiring it. *Rankin v. Charles*, xix. 490.

94. The collection of the purchase money of land will be restrained by injunction where it appears that there is a defect in the title, and that the solvency of the vendor is doubtful, until the purchaser is indemnified against loss. *Jones v. Stanton*, xi. 433.

95. Where, in an action at law, appearance was entered, by mistake, for a party who had not been served with process, or otherwise notified of the suit, it is error to decree a perpetual injunction against the judgment; the injunction should continue only until the party could have a trial of his rights at law. *Campbell v. Edwards*, i. 324.

96. A bond given to obtain an injunction of a judgment at law was conditioned, that the defendant in the judgment should pay "all sums of money, damages and costs, that should be adjudged against him, if the injunction should be dissolved." The injunction was dissolved, and the decree was that the bill be dismissed, and that the complainant pay the costs of the injunction suit—*Held*, that the securities in the bond were not liable to pay to the defendant in the injunction suit the amount of the judgment enjoined, nor the costs of that suit, unless he had first paid them to the officers entitled to them. *Corder v. Martin*, xvii. 41.

97. The complainant leased certain premises of one P., and procured the defendant to become his security for the payment of the rent, and, to indemnify him against the liability thereby assumed, executed to him a mortgage, in which it was provided that if the complainant should fail "to pay the whole or any part

of the rent, the defendant might sell," &c. The complainant went into possession of the leased premises, but soon abandoned them, and gave P. notice that they were untenable, and commenced a suit for damages. Subsequently the defendant, without any authority from the complainant, effected a compromise of his liability to P. as security for the rent, and paid a certain sum, and P. thereupon resumed possession of the leased premises, and the defendant advertised the mortgaged property for sale. The complainant brought his bill to enjoin the sale and all further proceedings under the mortgage—*Held*, that the resumption of possession, under the circumstances, did not release the complainant from his liability for rent, and that as the compromise appeared to have been made in good faith, and was for the advantage of the complainant, equity would not interfere to restrain the defendant from the prosecution of his legal rights under his mortgage. *Destrehan v. Scudder*, xi. 484.

b. COLLECTION OF TAXES.

98. The collection of a school tax, the assessment of which is illegal and void, will not be enjoined. *Sayre v. Tompkins*, xxiii. 443.

99. Nor will a sale by the City of St. Louis of land previously purchased by it at a tax sale be restrained, because the first sale passed no title by reason of irregularity and non-compliance with the pre-requisites of the law. *City of St. Louis v. Goode*, xxi. 216.

100. Where, by the ordinance of a city, the property of one tax-payer is exempted from assessment for a special tax, even if illegally, an injunction will not be granted to restrain the city from collecting the assessment against another tax-payer, which did not exceed the amount which the city was authorized to impose; especially if it does not appear that the plaintiff, on paying the assessment against him, will have paid more than his proportion. *Page v. City of St. Louis*, xx. 136.

101. Where, in the assessment of a tax, the party upon whose property the assessment was made, fails to make complaint of error to the court of appeals, and the tax books are made out and delivered to the collector, the ordinary judicial tribunals have no authority to stay the collection of the tax at the suit of the tax payer. *Scott, J., dis.* *Deane v. Todd*, xxii. 90.

102. But, although the courts will not interfere by injunction to restrain the sale of personal property for the payment of taxes illegally assessed, yet, it seems, they will so interfere, when it is brought to enjoin the sale of real property. *Lockwood v. City of St. Louis*, xxiv. 20.

c. PROCEEDINGS AT LAW.

103. A bill for an injunction releases all errors in the proceedings at law sought to be enjoined, and puts the party upon the equity of the case. *Moss v. Craft*, x. 720.

104. Where an injunction is asked to stay proceedings at law before judgment, it will only be granted upon terms, so as to leave the party at liberty to proceed to trial and judgment, unless a discovery is sought to aid a defense at

law, or the answer is, in some other way, necessary on trial. *Powers v. Waters*, viii. 299.

105. After the dissolution of an injunction, staying proceedings at law, and the awarding of damages, the court, as a court of chancery, has nothing more to do with the case; the parties should be left to proceed at law. *Ibid.*

106. And where an injunction to restrain proceedings to complete sales made under an execution, and to set them aside, is dissolved, a court of chancery cannot render a judgment against the complainant for the amount of a judgment at law rendered in his favor. *McDonald v. Cook*, xi. 632.

See *INFRA*, 174-176.

d. EXECUTION SALE.

107. An injunction will not be granted to restrain a sheriff's sale of land on the ground that such sale will pass no title, and tend to cast a cloud on the title of the true owner. *Drake v. Jones*, xxvii. 428. See *EXECUTION*, 46.

III. PLEADING.

a. BILL.

aa. *Form and Sufficiency.*

108. A recovery cannot be had in chancery on grounds foreign to those stated in the bill. *McKnight v. Bright*, ii. 110.

109. A bill, praying for an injunction of a judgment at law, stated that the judgment was founded on a bond given by the complainant for sundry claims transferred to him, which were at the time represented to be good, but which had proved unavailing owing to prior collections and insolvencies, and the failure of proof, in consequence of the absence from the country of the obligee in the bond, but alleged no obligation on the part of the obligee to furnish proof, or make good losses—*Held*, that the bill was properly dismissed. *Bartlett v. Pettus*, iii. 345.

110. The complainants purchased of the defendant certain horses, for which they gave their notes, payable in one and two years. At the same time the defendant's agent, who negotiated the sale, executed to the complainants a bill of sale of the horses, in the body of which he described himself as the agent of the defendant, and inserted therein an obligation to deliver to the complainants an authenticated pedigree of the horses, but signed the bill in his own name alone. The defendant obtained judgment on the note first maturing, and the complainants brought this bill, praying for a perpetual injunction upon the judgment. They charged that the pedigree never was delivered to them, and that thereby they have sustained damage to the amount of the judgment, and that the defendant is a non-resident. The defendant's answer admitted the sale, and the authority of the agent to make it, but denied his authority to bind him to furnish the pedigree. *Held*, that the bill of sale, signed in the name of the

agent, did not bind the defendant, but bound the agent personally and him alone; and that the bill was defective in not tendering to the defendant the amount admitted to be due, since those who seek equity must do equity. *Overton v. Stevens*, viii. 622.

111. Where the taking of an appeal was prevented three days after the trial, in consequence of the absence of the Justice, a bill brought to stay proceedings at law and to obtain an appeal, must show that the complainant did not know of the intended absence, and also that the judgment before the Justice was unjust, *Smith v. D'Lashmutt*, iv. 103.

112. M. and P. gave McC. their bond for the conveyance of certain land. McC. brought his bill in equity to compel them to convey, alleging that he had paid the consideration money. The proof in support of the allegation was, that M. and P. had employed one H. to do certain work; that McC. entered into partnership with H. in doing it; that an amount was reserved on settlement, by mutual arrangement, sufficient to pay the consideration money; and that the reservation was for that purpose—*Held*, that the proof did not sustain the allegation; that accord and satisfaction should have been alleged; and that H. should have been joined in the bill as defendant. *Moore v. McCullough*, v. 141.

113. The general charge of a fraudulent combination, &c., usually inserted in a bill, is not sufficient; there must be an allegation of specific fraud. *Lewis v. Lewis*, ix. 182.

114. In a bill for the specific performance of a contract to convey land, it is not necessary to allege that the contract was in writing. The presumption is that the contract was valid. *Wildbahn v. Robidoux*, xi. 659.

115. Where, to such a bill, the defendant pleads that the contract was not in writing and was void, and at the same time answers denying the contract set up in the bill, the answer overrules the plea. But to entitle the plaintiff to a decree against such answer, a contract in writing must be shown. *Ibid*.

116. Under the new code, a party seeking relief in equity, must state such facts as would have afforded ground for relief under the old system. *Jones v. Brinker*, xx. 87. And the petition must be framed with a view to such relief. *Vasquez v. Ewing*, xxiv. 31.

bb. *Multifariousness.*

117. Several injuries committed by different parties cannot be joined in chancery, any more than at law. Where several persons, whose acts are disconnected, injure the same person, the remedy is several against each. *Clamorgan v. Guisse*, i. 141.

118. P. delivered certain certificates of stock, in different insurance companies, to the complainant, and agreed, under seal, that upon the happening of a specified contingency, the stock should become the absolute property of the complainant. Subsequently the same stock was sold on execution against P., as his property, to various purchasers—*Held*, that a bill in which the several insurance companies and the several purchasers at the sheriff's sale were joined as defendants, and the object of which was to compel a transfer of the stock on the

books of the several companies to the complainant, was multifarious and bad. *Ferguson v. Paschall*, xi. 267.

119. A bill for a specific performance of a contract which charges that the land in question was paid for in money, and then again that it was paid for in specific property, is multifarious and bad on demurrer. The complainant not having availed himself of his right to answer in terms, the bill should have been dismissed without prejudice. *Wilkson v. Blackwell*, iv. 428.

120. J. filed his bill in equity, in which he charged that he had purchased a tract of land at a sale under an execution, issued by the Clerk of the Circuit Court, upon a transcript of a judgment of a Justice; that the defendant in the execution had previously conveyed the land to M.; that the deed to M. was fraudulent and void as to creditors, and was, though absolute upon its face, in fact a mortgage—*Held*, that the bill was multifarious in charging that the deed was a mortgage, and also fraudulent and void, and that a demurrer would lie; that the question as to the validity of the judgment under which the land was sold, the return of the execution and its validity, and the validity of the deed made by the sheriff, although made a part of the bill, could not be determined on demurrer. *Jones v. Paul*, ix. 290.

121. A., having an interest in the estate of B., conveyed it by deed to C., as security, and died. The deed was lost, and C. had his demand allowed against the estate of A., and C. then filed his bill against the administrators of A., and B. and the heirs of B.—*Held*, that the bill was multifarious in joining the administrator of A., who had no interest in the proceeding against the administrator and heirs of B., and was bad on demurrer. *Berry v. Robinson*, ix. 273.

122. A bill which seeks to establish, against several persons, demands which are similar, based upon the same facts, and growing out of and depending upon the same principles, is not multifarious. *Martin v. Martin*, xiii. 36.

123. Nor is a bill multifarious which seeks an account for rents, and profits of real estate, and an account of personal estate. *Rubey v. Barnett*, xii. 3.

124. Under the new code, a petition which seeks to eject one defendant, and prays partition with others, is demurrable for multifariousness, but the objection must be made before the hearing of the cause. *Alexander v. Warrance*, xvii. 228.

125. The new code does not affect the rule against multifariousness. In a suit against a trustee to recover the trust property, the administrator of the deceased grantor in the deed of trust, cannot be joined to recover a demand against him in respect to the trust property. *McLaughlin v. McLaughlin*, xvi. 242. *Robinson v. Rice*, xx. 229.

126. Where a cause of action against A. alone is joined with a cause of action against B., the petition is multifarious and bad on demurrer. *Stalcup v. Garner*, xxvi. 72.

127. Where, in a suit against A. and B., the petition set forth that A. conveyed a certain tract of land to B., and by mistake misdescribed it, and that B. conveyed the same to C., and also by mistake misdescribed it, and there was a prayer for the correction of both deeds, the petition was held multifarious. *Ibid.*

128. As to multifariousness in a petition by minors. *Temple v. Price*, xxiv. 288.

cc. *Parties.*

129. *It seems* that after a decree *nisi* a party can only be made a defendant by an original bill in the nature of a bill of interpleader. *Divers v. Mark*, iii. 81.

130. Where executions were issued against A., and were levied on certain lands which were sold by the Sheriff to B. and C., who afterwards sold the same to the complainants, A. having, prior to the sheriff's sale, purchased the land of D., but being in insolvent circumstances, and with a view to defraud his creditors, caused a conveyance of the same to be made by D. to his (A.'s) minor children—*Held*, that B., C. and D. must be joined as parties in a bill setting forth these facts, and praying that the deed to A.'s children be set aside, and a conveyance made by D. to the complainants. *Burk v. Flurnoy*, iv. 116.

131. It is not necessary to make a third person, who is not a party to the interests involved, and who would not be affected by a decree, a party. *Wilkinson v. Blackwell*, iv. 428.

132. A., as guardian of S., gave a bond, with B. and C. as his securities. Afterwards he conveyed a tract of land to his son D., who sold it to E. A. died insolvent, and his securities paid a debt due by him as guardian, without suit, and then filed a bill in equity against D. and E., to establish their demand against A.'s estate, and to set aside the conveyances from A. to D. and D. to E., as fraudulent, and to have the land sold to satisfy their demand—*Held*, that there must be an administrator of A.'s estate, who must be made a party to the bill. *Coates v. Day*, ix. 300.

133. A., to secure a debt due to B., executed a deed conveying certain lands in trust to C., who died leaving heirs. In a bill filed to have a new trustee appointed, and the land sold to satisfy the trust, the heirs of C. are necessary parties. *Fresh v. Million*, ix. 311.

134. In a bill charging an executor with waste, in not accounting for property which had come into his hands, neither the heirs of the testator, nor the administrator *de bonis non* are parties interested. *Clark v. Henry*, ix. 336.

135. The complainant claimed to have purchased all the right of B. to a certain tract of land, sold under an execution in favor of the former against the latter, and alleged that the land was entered in the name of one C., with the money of B.—*Held*, that B. was not a proper party to the bill, and that his declarations are not evidence against those claiming under C. *Wright v. Cornelius*, x. 174.

136. A mere allegation in a bill that B., with others, fraudulently conspired against A., does not authorize B. to be made a party, nor his declarations to be used as evidence against the others. *Ibid.*

137. The administrator and vendee of the real estate of the deceased may properly join in a bill for an account and conveyance of lands held in trust by the defendant for the deceased. *Ulrici v. Papin*, xi. 42.

138. Where A. places money in the hands of B., to purchase land for the benefit of C., and B. refuses to convey the land, thus purchased, to C., a bill to enforce such trust cannot be maintained in the name of A., but only in the name of the *cestui que trust*. *Culbertson v. Matson*, xi. 493.

139. Nor can A. devise the land thus purchased, so as to enable the devisee to compel a conveyance to himself. *Ibid.*

140. Where A.'s devisee, in such a case, claims a conveyance from B., under a transfer of C.'s equitable right, the latter must be made a party to the bill. *Ibid.*

141. In the prosecution and defense of claims in chancery, the executor or administrator is deemed a full representative of the creditors of the estates respectively committed to their care. Where the object of the suit is to restrain the administrator from selling property to pay debts of the deceased, and to set up a lost deed, it is sufficient to bring before the court the administrator and the heirs, who fully represent the property, and are liable for all demands upon it. *Kennerly v. Shepley*, xv. 640.

142. Where a bill is filed for the specific performance of a contract to convey land, the court cannot make an order requiring the defendants before the court to defend for all parties interested. *McQueen v. Chouteau*, xx. 222.

143. A., holding lands in trust, devised them to his executor, with direction to sell and convert them into personal property; the executor sold and conveyed the land, and it was *held*, in a suit against the purchaser and executor to establish the trust, that the heirs of A. were not necessary parties. *Paul v. Fulton*, xxv. 156.

144. Where the proper parties are not joined in a bill, and that fact does not appear on its face, it should be shown by plea. *Gamble v. Johnson*, ix. 597.

dd. *Prayer.*

145. Under the general prayer for relief, the court will grant such relief as is warranted by the allegations and proof. *Holmes v. Fresh*, ix. 200.

146. But the relief granted must be founded on the facts stated in the bill, and not such as are foreign to it, although proved at the hearing. *McNair v. Biddle*, viii. 257.

ee. *Bill of Interpleader.*

147. A bill of interpleader may be maintained against non-residents, under circumstances otherwise appropriate. *Freeland v. Wilson*, xviii. 380.

148. Where an administrator has been ordered by the county court to make distribution of his intestate's estate, he cannot, under ordinary circumstances, maintain a bill of interpleader against those claiming the benefit of the order. The order is conclusive, unless appealed from, and if general, not naming the distributees, the court may make it specific. *Ibid.*

ff. *Bill of Review.*

149. A bill of review, for errors apparent on the face of the record, will not lie, after the time when a writ of error could be brought. *Creath v. Smith*, xx. 113.

b. ANSWER.

150. When an answer to a bill is responsive, and clearly and positively denies the matter of equity therein, it is taken to be true, unless contradicted by two

witnesses, or by one witness and corroborating circumstances. But where the answer is thus contradicted in any one material particular, it is shaken throughout; since being false in one thing, it cannot be relied upon in any. *Roundtree v. Gordon*, viii. 19. *Gamble v. Johnson*, ix. 597. *Hewes v. Musick*, xiii. 395. *Johnson v. McGruder*, xv. 365. *Laberge v. Chauvin*, ii. 179. *Bartlett v. Glascock*, iv. 62.

151. As to facts sufficient to contradict a responsive answer. *French v. Campbell*, xiii. 485.

152. Although replications are filed to an answer, all the facts contained in the answer, which are responsive to the bill, must be taken to be true unless disproved. *Prior v. Matthews*, ix. 264.

153. An omission in an answer to deny a fact charged in the bill, is not an admission of the fact; but omissions and evasions in an answer are, however, proper subjects of animadversion, and calculated to weaken the force of the answer. *Gamble v. Johnson*, ix. 597.

154. An answer to a bill of discovery, (which alleged that the defendant had not paid any consideration for the property in question,) that the consideration was paid, without specifying from or to whom, or whose money was paid, is evasive and insufficient. *Wilson v. Woodruff*, v. 40.

155. A. and others having filed a bill to compel B. to convey lands alleged to have been purchased by him, in trust, he prepared his answer, made oath to it, and was about to file it, when the bill was dismissed. Some years after, B. having died, another bill was filed for the same purpose by the same parties, against the heirs and representatives of B.—*Held*, that since it appeared that many of the transactions must have been known exclusively to B., and unknown to his heirs, they should be permitted to make the answer thus prepared by him a part of their answer and evidence in their favor. *Culbertson v. Matson*, xi. 493.

C. PLEA.

156. A former recovery, pleaded in bar to a bill for relief against a judgment at law, alleged in the bill to have been obtained by fraud, will not avail as a defense. *Easton v. Collier*, iii. 379.

d. DEMURRER.

157. Where a demurrer to a bill of discovery is overruled, so much of the bill as remains unanswered is taken as confessed. *Nancy v. Trammel*, iii. 306.

158. It is no ground for demurrer to a bill affecting land that a greater part of it lies in a county other than that in which the suit is brought. This defense must be made by a plea to the jurisdiction. *Ulrici v. Papin*, xi. 42.

159. Where a demurrer to a bill is too general, it will be overruled. *Ibid*.

160. The objection to a bill for an account and conveyance of land held in trust, that there are purchasers without notice who should be made parties, cannot be made by demurrer, but must be raised by plea, or insisted on in the answer. *Ibid*.

161. On demurrer the court will not regard the exhibits as a part of the

bill, nor will the court examine the exhibits to see if they sustain or contradict the allegations therein. *Tesson v. Tesson*, xi. 274.

162. Where a demurrer is overruled, the court should compel the defendant to answer. *Cole County v. Angney*, xii. 132.

163. An objection to the jurisdiction must be by demurrer, and cannot be made after answer on the trial of the merits. *Martin v. Greene*, x. 652. *Oldham v. Trimble*, xv. 225. *Block v. Chase*, xv. 344.

164. If a bill contains no equity, it should be demurred to; if it is allowed to stand, evidence should be admitted to sustain it. *Groves v. Fulsome*, xvi. 543.

e. SPECIAL REPLICATION.

165. A special replication is not known in modern chancery practice. Where new matter is introduced in the plea or answer which makes it necessary for the plaintiff to put in issue some additional fact, he is permitted to amend. *Roundtree v. Gordon*, viii. 19.

IV. PRACTICE.

a. GENERALLY.

166. In a suit in chancery, defendants cannot be stricken out on their own motion; if improperly made parties, they must demur or plead. *Lyne v. Marcus*, i. 410.

167. An allegation in a bill not denied in the answer, is not admitted, but must be proved, unless the answer is excepted to in that respect. *Ingram v. Tompkins*, xvi. 399.

168. Where the defendant files his pleas and puts in his answer to a bill at the same time, and the pleas are overruled, it is error to take the bill as confessed. *Easton v. Collier*, iii. 379.

169. A. sold his interest as heir to a tract of land to B., who sold to the complainant. A. afterwards sold the same interest to C., (who purchased with full knowledge of the previous sale,) and refused to make the necessary deeds to B., though requested. The complainant brought his bill in equity against A., B., and C., (B. not being served with process,) in which he prayed that A. might be compelled to convey to B. or to himself, and that the deed to C. be annulled — *Held*, that A. and C. should be made to answer, that B. should be brought in by an *alias*, or by publication, and that the complainant should ask a decree of title to himself. *Huter v. Gallagher*, iv. 364.

170. Where the sufficiency of a plea to a bill is questioned, it is not demurred to, but set down for argument. *Roundtree v. Gordon*, viii. 19.

171. Where such plea is not to the jurisdiction, or of some matter of record, it must be sworn to, and the omission to do so is not waived by setting it down for argument. *Ibid*.

172. To authorize a complainant to examine one of several defendants in chancery, if an answer has been filed by him and a replication filed, the replica-

tion must be withdrawn, and an affidavit filed of the want of interest of such party. *Arnett v. Dodson*, x. 783.

173. After leave to answer is asked and given, the defendant, if he wish to demur, should plead or answer to some material fact; but that is a matter of discretion with the court. *Ulrici v. Papin*, xi. 42.

174. A bill to enjoin a judgment at law must make an exhibit of a transcript of the judgment. *Parsons v. Wilkerson*, x. 713.

175. On a motion to dissolve an injunction, the plaintiff is entitled to a trial on the merits; and after a dissolution, to a jury to assess the damages. (See Acts 1848-9, 85, § 12.) *Home Mutual Ins. Co. v. Bauman*, xiv. 74.

176. Where a petition prays, among other things, for an injunction, but that branch of the petition is not passed upon by the court below, nor brought in any way to its notice, the Supreme Court will not interfere. *Barada v. Inhabitants of Carondelet*, xvi. 323.

177. If a complainant assigns his interest *pendente lite*, the assignee must be brought in by motion. *Gamble v. Johnson*, ix. 597.

b. DISMISSAL.

178. After a cause is fully submitted at the hearing, it is discretionary with the chancellor either to dismiss the bill without prejudice, or to render a final decree; and when this discretion has been soundly exercised, the Supreme Court will not interfere. *Doggett v. Lane*, xii. 215.

179. The object of the bill was to compel a re-assignment of a leasehold estate to the complainants, who were partners. The defendant read in evidence the affidavit of one of them, to the effect that the assignment to the defendant was absolute in fact, (as it purported to be on its face,) and without any understanding or agreement that the same should be re-assigned to the complainants—*Held*, that the bill was properly dismissed without prejudice to the other complainant. *Mead v. Knox*, xii. 284.

180. Where a demurrer to a bill is overruled, and the complainant has leave to amend, but fails to do so, and the bill is dismissed absolutely—*Held*, in the absence of exceptions, that it was to be presumed that the bill was properly dismissed, but that the dismissal should have been without prejudice. *Timmons v. Chouteau*, xiii. 223.

181. Where the defendant pleads to the merits of a bill, and the issue is found in his favor, the bill should be dismissed absolutely. *Bell v. Simonds*, xiv. 100.

182. The plaintiff filed his petition in equity, and the defendant made answer thereto. When the cause was called for trial, both parties announced themselves ready, whereupon the court, *ex mero motu*, dismissed the petition—*Held*, that the petition was improperly dismissed. *Maguire v. Tyler*, xxv. 484.

c. EVIDENCE.

183. Where it is attempted to set up an equitable against a legal title, accompanied with long continued possession, the equity must be clearly established. *Richardson v. Robinson*, ix. 801.

184. Although it is well settled that a purchaser, with notice of the equity of another from one who purchased without such notice, may protect himself under the first purchaser, yet if there are suspicious circumstances attending the purchases, which are unexplained, and the answer of the first purchaser is evasive and does not respond to all the material allegations in the bill, it may be inferred that the first purchase was not *bona fide*, and consequently that the second purchase was not protected under the first. *Halsa v. Halsa*, viii. 303.

See EVIDENCE, 139-144.

d. SEQUESTRATION.

185. Circumstances stated under which a writ of sequestration may issue. *Roberts v. Stoner*, xviii. 481.

e. TRIAL BY JURY.

186. As to framing issues in chancery to be submitted to a jury. *Gamble v. Johnson*, ix. 597.

187. Where an issue of fact is tried by a jury, or the court sitting as a jury in a chancery cause, the only mode of having the justice of the verdict investigated in the court above, is by moving for a new trial before the decree is pronounced. A motion to dismiss the bill for defect of evidence, will not bring that question before the Supreme Court. *Woodson v. McClelland*, iv. 495.

188. Where issues are made by order of the chancellor under the statute, (R. S. 1845, 844, § 6,) the finding of the jury on such issue is conclusive on the chancellor, on the hearing of the bill, unless such finding be set aside. *Cochran v. Moss*, x. 416.

f. BILL OF EXCEPTIONS.

189. By the rules of chancery practice, in force prior to the passage of the practice act of 1849, bills of exception were as necessary as in common law suits. *Madden v. Madden*, xxvii. 544.

V. DECREE.

a. GENERALLY.

190. Where a suit in chancery is brought against two defendants, one of whom answers, and the other not, the complainant may dismiss his bill as to him who answers, and take a decree, *pro confesso*, against him who does not answer. *Evans v. Menefee*, i. 442.

191. In such a case, the defendant who answers, and as to whom the bill has been dismissed, has no right to appeal to the Supreme Court from the decree rendered against the other. *Ibid*.

192. Where one *cestui que trust* brought a bill in chancery against the other and the trustee, praying that certain lands should be conveyed to the complainant, and for general relief—*Held*, that the court properly decreed a conveyance to the *cestui que trusts* jointly, although the defendants were willing to have a

decree directing the conveyance to the complainant alone. *Rector v. Hutchison*, vii. 522

193. A. purchased, at an execution sale, land alleged to have been fraudulently conveyed by the defendant in execution. A. went into possession, sold his interest to B., and afterwards brought his bill to set aside the alleged fraudulent conveyance, and a decree was rendered in his favor. The defendants afterwards brought a bill of review, making A. and B. parties, and praying for a decree for rents and profits—*Held*, that, whether B. was properly made a party or not, no decree for rents and profits could be rendered against him. *Gamble v. Johnson*, ix. 597.

194. A party decreed specifically to perform a contract, cannot object to the decree, because it adjudges to one of the parties, in whose favor it is made, too large an interest, and too small to others, when it is the execution of the contract to any extent, or in favor of any party that he is resisting. *Harrison v. Town*, xvii. 237.

195. A decree reversed for an error in the adjustment of a partnership account. *White v. Bullock*, xviii. 16.

196. A decree in conformity with the statute relating to chancery practice, in proceedings against unknown heirs, is effectual to pass the title of the heirs. *Gitt v. Watson*, xviii. 274.

197. A decree rescinding the sale of land, in favor of the vendee, rescinds a mortgage given to secure the purchase money, and, consequently, a decree subjecting a portion of the mortgaged premises to sale, for any damages resulting to the vendor, or mortgagee, from the rescission of the contract, is erroneous. *Coffman v. Huck*, xix. 435.

b. WHEN TAKEN.

198. Where no answer to a bill is put in, a final decree cannot be made until after a decree *nisi*. *Evans v. The State*, i. 492.

199. Where a defendant was ruled to file an additional answer to a bill for a foreclosure, within a prescribed time, and failed to comply, it was *held*, that, under the statute of Feb. 19, 1825, (R. S. 1825, 638, §§ 10, 17, 37, 38,) a final decree could not be made until after a decree *nisi*. *WASH, J., dis. The State v. Evans*, i. 698.

200. A decree is premature when the cause has not been regularly set for hearing and tried at the next term. *Reed v. Rawlings*, i. 753.

c. PROVISIONAL.

201. A provisional decree in chancery, to become absolute, unless the defendants appear and prosecute their bill of review within a limited time, (R. S. 1825, 645, § 38,) cannot be set aside on motion. *Divers v. Mark*, iii. 81.

d. VOIDABLE.

202. Where, in proceedings in chancery, it appeared that certain infant defendants had not been served with process, but that they appeared, and, on their

own motion, had a guardian, *ad litem*, appointed to answer for them—*Held*, that, a decree against them in such a case was not absolutely void, and could not be impeached in a collateral proceeding. *Day v. Kerr*, vii. 426.

e. SETTING ASIDE.

203. Where the plaintiff's petition for the specific performance of a contract to purchase, was loose and vague, not clearly setting forth any contract, but the jury, from the evidence, found a contract, and a decree was made for specific performance, the court would not set aside the decree on account of the defects in the petition. *Despain v. Carter*, xxi. 331.

See APPEAL, II;....COSTS, 30;....INFANTS, III;....PRACTICE IN SUPREME COURT, VIII;....PUBLIC LANDS,¹ 35, 36;....SECURITIES, V, VI.

CIRCUIT ATTORNEY.

I. AUTHORITY TO ACT FOR COUNTY.

II. FEES.

I. AUTHORITY TO ACT FOR COUNTY.

1. No other person than the Circuit Attorney is authorized to prosecute actions in which the county is concerned. (See R. S. 1825, 156, § 2,) *St. Louis County v. Clay*, iv. 559.

II. FEES.

2. The office of Circuit Attorney, under the Territory of Missouri, was abolished on the 28th day of November, 1820, by the operation of the State Constitution, and the laws enacted in pursuance thereof; and the fees of Circuit Attorney were thenceforth governed by the State Laws. *Davis v. Cape Girardeau County Court*, i. 151.

3. The statute requiring the Circuit Attorney to "commence and prosecute all civil and criminal actions, in which the State, or any county in his circuit may be concerned," &c., (R. S. 1845, 156, § 11,) does not apply to cases arising under the act, forbidding the residence of free negroes in this State without license, and the Circuit Attorney is not entitled to a fee for an appearance and conviction in such cases. *Lackland v. Dougherty*, xv. 260.

4. The Circuit Attorney is entitled to one fee only upon a conviction, although, in the indictment, there may have been more than one count. *Ex parte Craig*, xix. 337.

5. The act relating to the "fees of the Circuit Attorney of the 8th judicial district," (Acts 1850-1, 216,) is an act "specially applicable to the county of St. Louis," within the meaning of the statute, (R. S. 1855, 1027, § 23,) and is not repealed by the act regulating fees in the revision of 1855, (R. S. 1855, 756, § 2.) *Mauro v. Buffington*, xxvi. 184.

CLERK OF COURT.

1. Office rent and fuel are necessities within the meaning of § 5, of the statute of February 12, 1825, (R. S. 1825, 208,) for which the Clerk of the Circuit Court is entitled to compensation from the county, when furnished by him for the purposes of his office. *Boone County v. Todd*, iii. 140.

2. Where the County Court refuses to draw their warrant on the County Treasury for the amount allowed by the Circuit Court to its clerk for office rent and fuel, a *mandamus* from the Circuit Court is an appropriate remedy. *Boone County v. Todd*, iii. 140. *St. Louis County Court v. Ruland*, v. 268.

3. Where the clerk of a court refused to issue more than one execution on a judgment, and the statute was silent as to the number of executions which might be issued, it was *held*, that he was not liable for a breach of his official duty. *The State v. Ruland*, xii. 264.

See LAWS, 31.

COMMON CARRIERS.

- I. DUTY OF.
- II. LIABILITY.
- III. ADVANCEMENTS ON GOODS.
- IV. CARRYING LETTERS.
- V. RESHIPPIING.

I. DUTY OF.

1. A common carrier upon Western rivers is not responsible for not drying merchandise which has been wet and damaged by inevitable accident. [*Bird v. Cromwell*, i. 81, commented upon and overruled, and the duties of common carriers on ocean and river navigation discriminated.] *St. Bt. Lynx v. King*, xii. 272.

2. It is the duty of the carrier to give notice of the arrival of goods to the consignee, if known to him, in a reasonable time. *Per TOMPKINS, J. Erskine v. St. Bt. Thames*, vi. 371.

II. LIABILITY.

3. Bank bills entrusted to a carrier are regarded as money. *Chouteau v. St. Bt. St. Anthony*, xi. 226.

4. Where no usage is shown, the receiving of money and the agreement of the carrier to deliver it, raises the presumption that the transportation of money belongs to his customary employment. *Ibid.*

5. And the question of usage should be left to the jury to decide from the testimony before them. *Same case*, xii. 389.

6. But the act of the captain in taking money for transportation is not *prima facie* evidence of the liability of the boat as a common carrier. [OVERRULING *Chouteau v. St. Bt. St. Anthony*, xi. 226.] *Chouteau v. St. Bt. St. Anthony*, xvi. 216. *Same case*, xx. 519.

7. In order to make the boat or its owners liable in such a case, it must appear that it was the usage of the boat to carry packages of money for hire, on account of the owners, or the known usage of the trade that it should do so. *Ibid.* *Whitmore v. St. Bt. Caroline*, xx. 513. *Chouteau v. St. Bt. St. Anthony*, xx. 519.

8. And evidence of a custom by boats to carry money for customers to gain patronage, does not establish a custom to carry it for hire. *Same case*, xx. 519.

9. A steamboat is not liable, as a common carrier, for packages of money, unless the carriage of it was undertaken for hire. *Chouteau v. St. Bt. St. Anthony*, xvi. 216. *Same case*, xx. 519.

10. A common carrier is liable for all losses that occur in the transportation of goods by him, except such as arise from the act of God, or the enemies of the country, or are excepted in his contract. He is, therefore, liable for goods lost by a collision on the river, notwithstanding his boat may have been, according to rules of navigation, in her proper place at the time of the collision. *Daggett v. Shaw*, iii. 264.

11. Where a carrier is sued for breach of a contract of affreightment, he may show, in defense, that although he may have been in default, the loss was in fact independent of it, and must have happened if such default had not existed. But if his delinquency contributed to the loss, he will still be liable. *Collier v. Valentine*, xi. 299. *Smith v. Whitman*, xiii. 352.

12. In an action against a carrier for loss occasioned by delay in a voyage, the plaintiff is entitled to recover as damages the legal interest on the amount which might have been realized on the goods shipped from the time they ought to have been delivered to the time of actual delivery, although there was no depreciation of market values during that period. *Ibid.*

13. The law which controls the liability of common carriers does not begin to apply until the actual bailment is made. The act of God will not excuse a man for failure to comply with an absolute contract to receive and transport goods at a future time, merely because he is a common carrier. *Collier v. Swinney*, xvi. 484. *Taylor v. St. Bt. Robert Campbell*, xx. 254.

14. The implied obligation of a common carrier to carry the baggage of a passenger, does not extend beyond ordinary baggage, or such as a traveler usually carries with him for his personal convenience, nor does it include more money than a reasonable amount to pay traveling expenses. *Whitmore v. St. Bt. Caroline*, xx. 513.

15. The liability of warehousemen and forwarding agents is different from that of common carriers; they are responsible only for losses occasioned by their fault or negligence. Thus, where a common carrier engages to carry goods to a certain point, the terminus of the road, and there to deliver them on board a steamboat, the liability of a common carrier continues only until the arrival of the

goods at the terminus of the road; and the liability of a warehouseman and forwarding agent then commences; if the goods are damaged while deposited on the levee awaiting the arrival of a steamboat, the owner can recover only for loss occasioned by negligence. *Holtzclaw v Duff*, xxvii. 392. See SUPRA, 1.

III. ADVANCEMENTS ON GOODS.

16. The custom under which carriers advance to forwarding agents the existing charges against the goods, and which makes the consignees and owners liable therefor, does not extend to advances made on demands against the consignees or owners wholly disconnected with the charge for transportation. *St. Bt. Virginia v Kraft*, xxv. 76.

17. Where the last of several carriers on the line of route between two distant points receives goods from another carrier, pays the freight and charges demanded at the point where the goods are received, and transports them to their destination—*Held*, there being no arrangement or understanding between the carriers with reference to “through” transportation, that the last carrier might retain possession of the goods until the consignee paid its customary charges for transportation, and the freight and charges advanced on the receipt of the goods, although such sum should exceed the amount for which the carrier that first received the goods agreed they should be transported. *Wells v. Thomas*, xxvii. 17.

IV. CARRYING LETTERS.

18. Under the act of Congress, (5 U. S. Stat. 736, §§ 10, 11,) a steamboat is not prohibited from taking a letter containing bank notes, if the contents of the letter relate only to the remission of the notes, and such is the presumption if no evidence of its contents be given. *Chouteau v. St. Bt. St. Anthony*, xi. 226.

V. RESHIPPIING.

19. Where a carrier receives goods to be conveyed to a certain point, reserving in the bill of lading the “privilege of reshipping,” his liability continues until the goods are delivered at their place of destination. Therefore, if the boat on which the goods are reshipped deviates from her route and is lost, the carrier is liable. *Little v. Semple*, viii. 99.

20. Where there is a privilege of reshipping reserved in a bill of lading, the carrier will be liable for any loss occurring on the boat on which the goods are reshipped, if under like circumstances he would have been liable had the loss occurred on his own boat. *Carr v. St. Bt. Michigan*, xxvii. 196.

21. The reservation in a bill of lading of the privilege of reshipping, confers only the right of transferring the goods shipped to another boat or vessel for the

purpose of being transported to their destination; it will not authorize the temporary storing of the goods at the point of reshipment; and the carrier will not be permitted to show that the custom was to store goods temporarily at the point of reshipment. *Ibid.*

See ACTION, 48; . . . FERRY, IV.; . . . TROVER, 3.

CONSIDERATION.

I. WHAT IS, AND SUFFICIENCY.

- a. GENERALLY.
- b. AGAINST PUBLIC POLICY.
- c. SMALLNESS OF, NOT EVIDENCE OF FRAUD.
- d. SPECIAL CASES.

II. FAILURE OF.

III. BILLS OF EXCHANGE AND PROMISSORY NOTES.

- a. SUFFICIENCY OF CONSIDERATION AND WHAT WILL VITIATE.
 - aa. Generally.
 - bb. Compromise of claim.
 - cc. Failure of Consideration.
 - dd. Notice of Fraud in.
 - ee. Illegality of.
 - ff. Forbearance to Sue or to Levy Execution.

IV. DEFENSE AND HEREIN OF THE PLEADINGS AND EVIDENCE.

I. WHAT IS AND SUFFICIENCY.

a. GENERALLY.

1. Every contract must be founded on a valuable consideration, and be certain in its terms. *Wesson v. Horner*, xxv. 81.

2. And a valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the promisee. *Block v. Elliott*, i. 275. *Mullanphy v. Reilly*, viii. 675.

3. The compromise of a doubtful claim is a valuable consideration. *Mullanphy v. Riley*, x. 489.

b. AGAINST PUBLIC POLICY.

4. An agreement to reward a public officer (in this case a policeman) for doing that which it is his duty by law to do, is void as against public policy. *Kick v. Merry*, xxiii. 72.

5. An agreement to pay a certain sum in consideration of services to be rendered in securing a commutation of the sentence of a convict, is void as against public policy. *Kribben v. Haycraft*, xxvi. 396.

C. SMALLNESS OF, NOT EVIDENCE OF FRAUD.

6. Smallness of consideration, in a sheriff's deed, is not, of itself, evidence of fraud. *Chouteau v. Nuckolls*, xx, 442.

D. SPECIAL CASES.

7. The plaintiff gave his note to C. Before its maturity he was garnished as the debtor of C., and judgment was taken against him. The note had been assigned to the defendant, who, in consideration of the plaintiff's renewal of it, promised to pay him whatever he might be compelled to pay on the judgment against him as a garnishee of C.—*Held*, that the consideration was sufficient to support the promise. (See 6 *Mass.* 58.) *Turner v. Crigler*, viii, 16.

8. A father, in consideration that his son would remove from a distant part of the State and come and reside near him on the land in dispute, promised his son that he would give him the land. The son accepted the offer and removed to the land, and the father assigned to him the certificate of entry of the land from the government—*Held*, that the trouble and expense of removal, incurred on the part of the son, constituted a sufficient consideration to support the contract of assignment. *Halsa v. Halsa*, viii, 303.

9. A promise by the wife, after the death of her husband, to pay a bill for medical attendance upon the family of the deceased during his lifetime, is not founded upon a good consideration, although a part of the bill was for attendance upon slaves which were her separate property. *Kennerly v. Martin*, viii, 698.

10. A. contracted to build a boat for the defendant, and employed the plaintiffs to work upon it. After the work was completed and before the boat was delivered, the defendant promised to pay the plaintiffs their claims, in consideration that they would deliver to him the boat—*Held*, that as it did not appear that the possession of the plaintiffs was legal, the promise was without consideration and void. *Jones v. Miller*, xii, 408.

11. The breach of a voluntary promise to continue a suit, by taking judgment against the defendant immediately, and issuing execution and seizing his property, it not appearing that he was thereby deprived of any defense to the action, or that he had any, will not give him a cause of action. *Hunt v. Johnston*, xxiii, 432.

12. A. had a slave in his possession, claiming him by purchase, in good faith, for a valuable consideration. B. claimed the slave, and brought a suit against A., to obtain possession of him. While the action was pending, B. promised to pay A. the bill of the physician, who had previously been, and then was, attending the slave, who was sick. B. recovered judgment against A. for the slave. A. sued B. for the amount of the physician's bill—*Held*, that he was entitled to recover. *Livingston v. Dugan*, xx, 102.

13. If, when the sale of land has been completed by the execution of the deed, the grantor consents that the grantee may have certain personal property then on the land, this agreement is without consideration and void. But this consent or agreement may be used in evidence to show that it was a part of the previous

contract that this property should pass to the grantor. *Alexander v. Lane*, xxi. 536.

II. FAILURE OF.

14. D. owed R., and arranged with J. to procure a discharge of the debt on receiving a certain negro. J. took the negro and gave his bond to R., who discharged his debt against D.—*Held*, that the consideration of the bond was the discharge of D., and that it was not affected by the fact that the negro subsequently obtained his freedom. *Relfe v. Jones*, iv. 89.

15. The fact that the vendor of an improvement on public land did not reside on the land at the time of the sale, is no defense to an action for the consideration money. *Stubblefield v. Branson*, xx. 301.

16. But the fact that the vendor was not in possession, and also that the land had previously been entered by a third party, shows a failure of the consideration and is a good defense. *Burns v. Hayden* xxiv. 215.

III. BILLS OF EXCHANGE AND PROMISSORY NOTES.

a. SUFFICIENCY OF CONSIDERATION AND WHAT WILL VITIATE.

aa. Generally.

17. Anything which is beneficial to one party, or might tend to the loss or disadvantage of the other, is a good consideration for a promissory note. *Mullanphy v. Reilly*, viii. 675. *Block v. Elliott*, i. 275.

18. A. obtained a judgment against B., who afterwards died, leaving the judgment unpaid. His widow, in order to remove the supposed lien from the real estate of B., executed her note for the amount of the judgment, secured by a mortgage on her own real estate, which A. accepted in lieu of the judgment, and suffered the three years allowed for the presentation of demands against estates to pass, without presenting the judgment for allowance—*Held*, that the note was executed upon sufficient consideration. *Mullanphy v. Reilly*, viii. 675.

bb. Compromise of Claim.

19. Where a defendant, a security on a note, compromises the suit and cause of action, and executes a new note for a less sum than that demanded, with a full knowledge of all the facts, he is bound by the compromise, and cannot go behind it in defending against the compromise note. *Draper v. Owsley*, xv. 613.

20. Though a promissory note, given by way of compromise of a doubtful right, is valid and binding, it is a good defense that it was obtained through a fraudulent suppression of the truth. *Stephens v. Spiers*, xxv. 386.

cc. Failure of Consideration.

21. Where an article forming the consideration of a note is of no value for the purpose for which it was purchased, it amounts to a total failure of considera-

tion, although it may be of some value for other purposes. *Barr v. Baker*, ix. 840.

22. The law seems to be that a note given for a patent that is void, is without consideration. *Joliffe v. Collins*, xxi. 338.

dd. *Notice of Fraud in.*

23. Notice to several directors of a bank taking a note by indorsement, of fraud in the consideration of the note, is notice to the bank. Such notice may be presumed, where some of the directors of the bank are also directors of an insurance company, by whom the note was indorsed to the bank. *City Bank of Columbus v. Phillips*, xxii. 85.

ee. *Illegality of.*

24. Where the consideration of a note is the doing of an act forbidden by law, either directly or impliedly, the note is void for illegality of the consideration. Thus, where a note was given for a town lot, sold to the maker by the payee, before the town plat was made out, acknowledged or recorded, as required by the statute, (R. S. 1835, 599,) the note was held void. *Downing v. Ringer*, vii. 585.

25. The notes of the Bank of the Commonwealth of Kentucky are bills of credit within the meaning of the constitution of the United States, and a promise, the consideration of which was such bank notes, is void. *Bank Com. Kentucky v. Clark*, iv. 59. *Griffith v. Bank Com. Kentucky*, iv. 255.

ff. *Forbearance to Sue or to Levy Execution.*

26. A constable being about to levy an execution on certain property, was requested by the debtor to levy it on certain other property, which would have been amply sufficient; but this he refused to do, but took from the debtor a note of an extortionate amount for forbearance to levy on the first mentioned property—*Held*, that the note was void. *Ashby v. Dillon*, xix. 619.

27. The Bank of Missouri, as the holder of a bill of exchange, agreed with the acceptor to receive from him twenty per centum on the amount of the bill every four months, and interest in advance until the amount should be fully paid, and that no suit should be brought thereon, if the payments were made as agreed upon. Only one payment was made in pursuance of this agreement—*Held*, that if the Bank had the right to receive the interest in advance, there was no sufficient consideration for the promise not to sue; and if the contract was usurious, it could not avail the bank, since the usurious interest might immediately be recovered back, and therefore that there was no consideration for the agreement to delay, and that the Bank could sue at any time. *Marks v. Bank of Missouri*, viii. 316.

IV. DEFENSE AND HEREIN OF THE PLEADINGS AND EVIDENCE.

28. In notes payable to bearer, or indorsed in blank, which are transferable by delivery, any person who comes by them *bona fide*, and for a valuable con-

sideration, and in the usual course of business, may recover on them, notwithstanding they may have been lost or stolen, or obtained by fraud from the true owner. But if any suspicious circumstances are made to appear, if it is shown that the real owner of the note has never parted with his interest in it, the holder is then bound to prove that he came by it honestly, and for a valuable consideration. *Anderson v. Long*, i. 365.

29. In an action by payees against the maker of a promissory note, the defendant will not be allowed to show that the note was given for lands sold at public sale by the payees, representing themselves as owning the same when they did not; nor that they obtained the order of court under which the land was sold by false and fraudulent representations, nor that the deed conveying the lands to them was made to them by mistake. The maker will not be allowed to keep the land, and refuse to pay the purchase money. He has his remedy against the plaintiffs by action for the fraud, or in equity. *Steinback v. Ellis*, i. 414.

30. Between the original parties to a negotiable note, the consideration may be inquired into. *Klein v. Keys*, xvii. 326.

31. And where there is a failure of the consideration expressed in a note, parol testimony is admissible to show that the consideration expressed was only a part of the consideration in fact. *Dorsey v. Hagar*, v. 420.

32. At common law, a partial failure of the consideration of a note cannot be given in evidence in mitigation of damages. *Ferguson v. Huston*, vi. 407.

33. But it is otherwise under the statute. (R. S. 1855, 1290, § 24.) *Gamache v. Grimm*, xxiii. 38.

34. Where A. obtained B.'s note for a large sum by fraudulent representations, part only of the amount being due to him, it was held that he could recover of B. on the note only the part due. *Brown v. North*, xxi. 528.

35. In an action of assumpsit upon a bill of exchange by the indorsee against the maker, evidence that the bill was obtained fraudulently, or without consideration, and that the indorsee was privy thereto, is admissible. *Fisk v. Collins*, ix. 136.

36. Parties entered into an agreement, under seal, to submit certain business matters in dispute to three of their neighbors, who awarded that the defendant should pay the plaintiff \$60, and the defendant thereupon promised to pay it. In an action of assumpsit to recover the amount, the agreement under seal is competent to show that there was a good consideration for the promise. *Morrow v. Smith*, x. 308.

37. A purchaser of slaves, with warranty of title so long as his possession is undisturbed, cannot set up in defense to an action on a promissory note given for the purchase money, that, at the time of sale, the title was not in the vendor. And such case is not within § 14, Art. V. of the statute relating to Justice Courts. (R. S. 1845, 653.) *Morrison v. Edgar*, xvi. 411.

38. In an action on a promissory note, the defense being that it was given for a bet on an election, (R. S. 1845, 541, § 10,) the answer must state, not only that the election was authorized by the constitution and laws of this State, but what particular election it was, between whom pending, &c., or defendant will

be precluded from introducing evidence on the subject. *Sybert v. Jones*, xix. 86.

39. Fraud, in the consideration of a negotiable promissory note, is no defense to an action thereon by the indorsee to whom it was indorsed before maturity without notice. *Jaccard v. Shands*, xxvii. 440.

See ACTION, 10;....BOND, II;....BONDS, NOTES AND ACCOUNTS, II;....
CHANCERY, 65;....CONVEYANCES, 1, 2;....DEED OF TRUST, I;....
EXECUTION, 78, 79;....FRAUD, 2;....FRAUDULENT CONVEYANCES,
VII;....GUARANTY, II;....PLEADING, 41, 42.

CONSTABLE.

I. LIABILITY.

II. PROCEEDINGS AGAINST.

III. CONSTABLE'S BOND,

- a. SUFFICIENCY.
- b. APPROVAL.
- c. ACTION ON.
- d. LIABILITY OF SURETY.

I. LIABILITY.

1. A constable is liable for the act of his deputy in making a false return. *Blunt v. Sheppard*, i. 219.

2. After property is levied upon by a constable, he cannot excuse himself from liability therefor, on the ground that it was recaptured and taken from him by force. *The State v. Lowry*, viii. 48.

3. A constable who, after his term of office has expired, claims and collects as constable illegal fees, is responsible for the penalties imposed by law, (R. S. 1845, 506, § 38,) and cannot say that he did not collect as an officer. *Jackman v. Bentley*, x. 293.

II. PROCEEDINGS AGAINST.

4. Where third persons are interested, the fact that a party acted as a constable is sufficient to show his official character, without producing his original appointment. *Hart v. Robinett*, v. 11. *Hart v. Spence*, v. 17.

5. In proceedings before a Justice against a constable, the summons may be directed to any suitable person, in pursuance of the statute, (R. S. 1835, 352, § 20,) the authorization being indorsed thereon; but the want of such indorsement is a defect which is cured by an appearance without taking exceptions thereto, and the objection cannot be raised in the appellate court. *Ibid. Ibid.*

6. In a suit before a Justice against a constable, for collecting illegal fees on an execution, the execution was described as in favor of A. against B. and C., and dated November 1, 1843. The execution offered in evidence was in favor of A., assignee of D. and E., against B. and C., dated November 6, 1844—*Held*, that the description was sufficient. *Jackman v. Bentley*, x. 293.

7. The plaintiff, on the return day of an execution, sued out before a Justice, without notice, a judgment against the constable for a false return on his execution—*Held*, that the Circuit Court, on appeal, properly non-suited the plaintiff. *Dickerson v. Apperson*, xix. 319.

See PRACTICE, 170; . . . PROCESS, 7.

III. CONSTABLE'S BONDS.

a. SUFFICIENCY.

8. It is not necessary that a constable's bond should specify the township for which he was elected. (See R. S. 1835, 116, § 2.) *The State v. Kirby*, ix. 295.

b. APPROVAL.

9. Where the clerk of the County Court received a constable's bond in vacation, and indorsed upon it, "filed" and subscribed his name thereto, and placed the bond on the files of his office, where it permanently remained—*Held*, that this was sufficient evidence of the approval of the bond by the clerk, and that the failure of the court to approve or reject the bond at the next term, did not affect its validity. (See R. S. 1835, 116, § 2.) *Jones v. The State*, vii. 81. *Moore v. The State*, ix. 330.

c. ACTION ON.

10. The plaintiff was C.'s security for a debt due to D., who sued C. alone, recovered judgment, and placed the execution in the hands of a constable for collection, through whose neglect the money was not made out of C., and the plaintiff was compelled to pay the debt in consequence—*Held*, that the plaintiff had no direct legal interest in the process against C., and could not be considered as injured by the constable's neglect in such sense as to enable him to maintain an action on the constable's official bond. (See R. S. 1825, 213, § 3.) *The State v. Reynolds*, iii. 95.

11. The plea of *non est factum* to an action on a constable's bond, puts in issue only the execution of the bond. *The State v. Ferguson*, ix. 285.

12. The statute which prescribes the limitation to actions upon a constable's bond, (R. S. 1835, 116, § 4,) does not begin to run until the expiration of the term for which the constable was elected, and is not affected by the resignation of the constable. *Ibid*.

13. The summary proceeding against a constable and sureties for failure to levy an execution, &c., under the statute, (R. S. 1845, 665, §§ 23–28,) must be

before the Justice who issued the execution, in respect to which the delinquency arose, or before his successor in office. *Roach v. Settles*, xix. 397.

14. Where a constable levies an execution upon property exempt from execution, relief can be had only by an action in the name of the State on his official bond, against him and his securities. The summary proceedings specified in the statute, (R. S. 1855, 968, §§ 23-28,) do not apply in such case. *Miller v. Wall*, xxvii. 440.

See JURISDICTION, 23; . . . PRACTICE, 30; . . . RECORD, 9; . . . TRESPASS, 23-25.

d. LIABILITY OF SURETY.

15. The securities of a constable are not liable, on his official bond, for the value of demands placed in his hands for collection. (R. S. 1835, 116, § 2—352, § 21-367, § 18.) *Bogart v. Green*, viii. 115. [But see R. S. 1855, 348, § 13.]

16. The act of January 4, 1841, relating to the liability of county officers on their official bonds, (Acts 1840-41, 31, § 5,) does not render the securities of a constable liable to the penalty imposed upon such officers for failing to return an execution by the 8th section of the act of 1835, (R. S. 1835, 117.) *McCurdy v. Brown*, viii. 549. *

17. To make a constable or his securities liable for a failure to return an execution, it is necessary to show that such execution was delivered to him. *DuBreuil v. The State*, x. 435.

18. Where an execution is placed in the hands of a constable shortly before the expiration of a term for which he had been elected, but is not returnable until after the commencement of a term for which he is re-elected, and not until after he has given bond and had the same approved for the latter term, the securities on the first bond will not be liable for a failure to pay over the money on the return day, there being no obligation on the constable to pay, and no default until that time. *Warren v. The State*, xi. 583.

19. The deputy of a constable failed to pay over money that he had collected, and suit was brought against the sureties of the constable—*Held*, that it was no defense that the constable had forfeited his office by removal from the State. *The State v. Muir*, xx. 303.

20. The sureties of a constable are liable for the delinquencies of one acting as deputy, with the consent of the constable, though his appointment is not filed as required by statute, (R. S. 1845, 212, § 7.) *Ibid*.

21. Where money is collected by a constable on an execution, interest is recoverable at the rate of one hundred per cent. per annum, in a case of delinquency, only from the return day of the execution; and such interest may be recovered of the securities of the constable, after the expiration of his term of office, and is properly cognizable in a Justice's court. *Same case*, xxiv. 263.

CONSTITUTION.

1. Where one General Assembly proposes amendments to the Constitution which are ratified by the next General Assembly, (See Art. XII,) the Supreme Court may nevertheless look into their proceedings to see that all pre-requisites have been complied with, and that they have been adopted by the proper majorities. *The State v. McBride* iv. 303.

2. An amendment which is ratified by two-thirds of a quorum, that is, two-thirds of all elected, is ratified by two-thirds of the house, within the meaning of the Constitution. *Ibid.*

3. The first amendment proposed by the 7th General Assembly and adopted by the 8th, vacating the offices of the Judges of the Circuit Court, is an independent amendment, and vacated the offices of the Judges of that court January 1, 1836. *Ibid.*

4. Where the language of the Constitution is of doubtful import, the circumstances of the people, and the history of the instrument, may be examined in construing it; but where the language is plain and consistent with the other parts of the instrument, it is otherwise. *Hamilton v. St. Louis County Court*, xv. 3.

CONTEMPT.

1. Where it does not appear that the person fined for contempt of court was present in court at the time the fine was imposed, or that he was notified to be present, the judgment of the court imposing the fine will be reversed. *Strother v. The State*, i. 772.

2. A sheriff has no power to take a recognizance for the appearance of a person arrested for a contempt of court. *The State v. Howell*, xi. 613.

See ARBITRATIONS AND REFERENCES, 8, 9; ... HABEAS CORPUS, 8; ... NOTARY PUBLIC.

CONTRACT.

I. IMPLIED.

II. CONSTRUCTION.

- a. GENERAL PRINCIPLES.
- b. CUSTOM.
- c. EXECUTED AND EXECUTORY CONTRACTS.
- d. LEX LOCI.
- e. SPECIAL CASES.
- f. RIGHTS AND DUTIES OF PARTIES.

III. PARTIES TO THE CONTRACT.

- a. JOINT AND SEVERAL.
- b. INCOMPETENT.

- IV. VALIDITY AND AVOIDANCE.
- V. MUTUALITY AND DEPENDENCE.
- VI. CONDITION PRECEDENT.
- VII. DURESS.
- VIII. SERVICES.
- IX. ASSIGNMENT, RESCISSION AND DISCHARGE.
- X. ACTION ON.
- XI. EVIDENCE.

I. IMPLIED.

1. The fact alone that a man is contractor on a particular section of a railroad does not render him primarily liable for the board of hands employed to work on it, especially where there is a sub-contractor. *Cahill v. Ragan*, xx. 451.

II. CONSTRUCTION.

a. GENERAL PRINCIPLES.

2. It is a well established principle that where a contract is reduced to writing, all anterior and contemporaneous stipulations and representations (which are not fraudulent) are merged in the written contract. *Gooch v. Conner*, viii. 391.

3. Mere proposals, preliminary to a contract, form no part thereof, unless incorporated into it. *Hunt v. Johnston*, xxiv. 509.

4. In the construction of contracts, courts will look to the objects which the parties had in view, and where there has been a substantial compliance with the obligations assumed, it will be deemed sufficient. *Hovey v. Pitcher*, xiii. 191. *Pitcher v. Hovey*, xvi. 436.

5. In construing a written contract, the acts of the parties to it are entitled to great weight. *Patterson v. Camden*, xxv. 13.

b. CUSTOM.

6. Evidence of a custom will not be allowed to control the construction of a contract, where it does not appear that the custom had the force of law, nor that it was in the minds of the parties at the time of making the contract; and, at all events, this mode of expounding contracts by parol evidence of the understanding of same, is extremely dangerous, and, by law, is not admissable. *Clamorgan v. Guisse*, i. 141.

7. Where there is a contract for the delivery of shingles by the thousand, it may be shown that, by the general, well-established and known custom of the trade, two packs of a certain size represent a thousand; and where such custom is shown, the parties will be presumed to have contracted with reference to it. *Soutier v. Kellerman*, xviii. 509.

8. In order that a custom or usage of trade may enter into and affect the construction of a contract, it must be shown to be so general and well established, that the parties must be presumed to have had knowledge of it, and to have contracted with reference thereto. *Martin v. Hall*, xxvi. 386.

9. The meaning of the term "prime barley," as used in a contract of sale, is to be determined by mercantile usage. *Whitmore v. Coats*, xiv. 9.

C. EXECUTED AND EXECUTORY CONTRACTS.

10. Distinction between executed and executory contracts. *Reese v. Smith*, xii. 344.

d. LEX LOCI.

11. Although the nature and effect of a contract depend upon the laws of the State in which it is made, or is to be performed, the remedy for the breach of it is governed by the laws of the State where redress is sought. *Broadhead v. Noyes*, ix. 55. *Dorsey v. Hardesty*, ix. 157.

e. SPECIAL CASES.

12. W. drew his order on a third person^r in favor of J., for two dollars in money, and forty-six pounds of beef—*Held*, that the contract was divisible, and that J. could maintain an action of debt on the order for the amount of the money. *Johnson v. White*, ii. 223.

13. B. agreed to pay S. for building a cellar wall, when he (B.) should build upon it, or sell the lot upon which it was constructed—*Held*, that B. is entitled to a reasonable time within which to sell or build, before payment could be required of him; and what would be a reasonable time depends on circumstances. *Bryant v. Saling*, iv. 522.

14. Where a carpenter does work for a butcher, to be paid for in fresh meat, and no time, place or kind of meat is specified, and the carpenter receives at divers times at the butcher's stall such meat as he desired—*Held*, that the meat was payable at the butcher's stall in such quantities as the carpenter might need, and the butcher have for sale. *Kraft v. Hurtz*, xi. 109.

15. The defendants purchased plaintiff's interest in a steamboat and agreed "to pay all claims against said boat, and hold (plaintiff) harmless from all such claims"—*Held*, that, only contract debts and liabilities of the boat were embraced in the agreement, and not rights of action against the officers or owners for supposed neglect of duty as bailees. *Cathcart v. Foulke*, xiii. 561.

16. The County Court made an order appointing a commissioner to let the building of a bridge to some undertaker who would wait for his pay "until the amount is received from the State out of the road and canal fund." The commissioner, under this order, let the building of the bridge to A., who entered into a bond, which recited the order of the court, and contained an agreement "on the part of the County Court, as said court," to pay a certain sum on the completion of the work, provided that, "if there be not a sufficient amount of the dividend of the road and canal fund on hand, at the time of the comple-

tion of the bridge, the said undertaker is to wait on or indulge the said county by receiving of said county as fast as said funds shall arrive." After the completion of the work, A. received a warrant on the County Treasurer "payable out of the road and canal fund," which was assigned to the plaintiff—*Held*, that the plaintiff could only look to the road and canal fund, and could not compel the county to pay the warrant out of its own proper funds. *Pettis County v. Kingsbury*, xvii. 479.

17. Certain parties agreed to pay each his proportionate share of any expenses incurred in defending the title to land owned by them. The share of each was to be based on the value of his respective interest in the land, the value of the land to be ascertained by the county assessment—*Held*, that it was necessary for the committee to make only one valuation of the land, upon the basis of which, calls might continue to be made until the end of the litigation, although the relative value of the several interests might have changed. *Lindell v. Brant*, xix. 50.

18. A., the owner of a share of the outfit of a California gold company, sold to B., "one half of his interest in the company," but the writing provided that B. should not be a partner in the company, but only "purchaser of A.'s interest in the metals and ores" that might be obtained—*Held*, that B. acquired no interest in the outfit. *Phillips v. Jones*, xx. 67.

19. A., B. and C. agreed, under seal, that a pork house should be built upon a certain lot, to be held by C., under a lease from one D., B. to erect the house, and A. to advance him \$1,000, and C. to advance to him \$3,000, and make a lease of the pork house, when completed, to A., for a term of two years, at the annual rent of \$2,000, the \$1,000 advance by him to be credited on the first half year's rent—*Held*, that a failure to complete the building would not give to A. a cause of action against C.; nor could A. treat the money advanced by him to B., as money advanced upon the credit of C. *Clarkson v. Morrison*, xxiv. 134.

20. A person authorized by a railroad company to collect calls upon stock, and entitled to receive as compensation a certain rate per cent. of the amount, would not be entitled to charge such commissions for receiving and delivering the bonds of a city and county, with which, in lieu of money, the calls on their stock was paid. *Lakenan v. Hannibal and St. Joseph R. R. Co.*, xxiv. 505.

21. A party contracted with counsel to pay him five hundred dollars "for services rendered, and to be rendered," in certain sums named, and one thousand dollars additional upon a contingency. The counsel died before rendering the future services—*Held*, that his administrator was entitled to recover the five hundred dollars and interest, from the date of the contract. *Town of Carondelet v. Allen*, xiii. 556.

22. A. agreed to deliver to B. "two rafts of pine logs, containing each from 350,000 to 400,000 feet, more or less; one raft to be of the first run in the spring, and the other as soon thereafter as possible (want of sufficient water, and dangers of navigation excepted); and in case of a loss of a portion of said rafts, the loss to be deducted, *pro rata*, as per number of logs contained in the whole." A. brought to the place specified a raft containing 419,226 feet; he cut off and delivered to B. 323,385 feet of this raft, B. demanding the whole raft—*Held*, in a suit by B. to recover damages of A. for his refusal to deliver the whole raft,

that B. was not entitled, under the contract, to demand the whole raft of 419,226 feet, the words "more or less" not covering so great an excess as 19,226 feet; that the delivery of a raft containing any quantity of logs between 350,000 and 400,000 feet would be a legal compliance with the contract; that it was competent for A. to show that when the raft in question started from his boom in Minnesota, it contained 486,402 feet of logs, and that 67,176 feet were lost, by reason of want of water and dangers of navigation, in running it to its place of destination. *Patterson v. Judd*, xxvii. 563.

f. RIGHTS AND DUTIES OF PARTIES.

23. Where A. contracts to do work under the control and direction of B., he is not responsible for want of skill, unless he fails to comply with B.'s directions. *Denny v. Kile*, xvi. 450.

24. The plaintiff bound himself to winter a certain number of cattle for the defendant, and the defendant obligated himself to pay a stipulated sum for every head delivered in the spring "in good, thrifty order and condition"—*Held*, that the plaintiff could not recover for the keeping of any cattle that died, or were not delivered "in good, thrifty order and condition," although their death or ill-condition might not have been caused by any want of care on his part. *Stonam v. Waldo*, xvii. 489. See *INFRA*, 72.

25. Omnibus proprietors who agree not to run over a certain route, cannot evade their contract by associating themselves with others and running under the name of a new firm. *Foster v. McO'Blenis*, xviii. 88.

26. And it is not any justification to them, in an action for damages for a breach of the contract, that the plaintiff failed to furnish carriages enough for the public convenience, although it might affect the measure of damages. Such a contract would be as much violated by an occasional, as by a continual running. *Ibid*.

III. PARTIES TO THE CONTRACT.

a. JOINT AND SEVERAL.

27. The plaintiffs entered into articles of agreement with the defendant and three others, by which the latter agreed to haul certain articles at a stipulated rate and price, and the plaintiffs were to pay them therefor the amount "due to each in accordance with the amount by each respectively hauled"—*Held*, that the contract was several, and not joint. *Sublett v. Noland*, v. 516.

28. Where A. sold a part of a boat to B. and C., by words which made the sale a joint one, and later in the contract the interests of B. and C. were defined, and each was to give separate security for the purchase money, and A. was bound to the purchasers jointly that the title was good—*Held*, that the contract and sale were joint, and the repudiation thereof by one of the vendees discharged the vendor. *Clark v. Cable*, xxi. 223.

b. INCOMPETENT.

29. Any man against whom a conveyance or contract is set up, is at liberty to show, that at the time of making it, he was not possessed of sufficient reason to

be capable of understanding the act he was performing. *Tolson v. Garner*, xv. 494.

IV. VALIDITY AND AVOIDANCE.

30. A contract between the Bank of Missouri and the Merchants' Bank of Baltimore, to collect the debts of the latter in depreciated bank paper, even if admitted to be illegal and in violation of the charter of the former, will not render it liable to pay in specie the amount collected under such contract. *Bank of Missouri v. Merchants' Bank of Baltimore*, x. 123.

31. Drunkenness does not render a contract void, but only voidable. *Broadwater v. Darne*, x. 277.

V. MUTUALITY AND DEPENDENCE.

32. Covenants, in relation to their dependence or independence, are to be construed according to the intention and meaning of the parties, as gathered from the instrument. A covenant with a penalty annexed will always be considered as independent. *Freeland v. Mitchell*, viii. 487.

33. A. purchased of B. a tract of land, and executed his notes for the purchase money, payable in instalments, the last due August 9th, 1840, and at the same time B. executed his bond for a conveyance, whenever the purchase money should be fully paid. On the 25th September, 1842, A. executed a new note to B. in lieu of the note given for the last instalment—*Held*, that the note having been given in consideration of the cancellation of the note due on the 9th August, 1840, and having been executed after that note became due, it was payable, independent of any covenants contained in that bond. *Brand v. Vanderpool*, viii. 507.

34. A. bought land of B., and gave his promissory note, payable at a specified time, for the purchase money, and B., at the same time, gave his title bond, conditioned for a conveyance at the time specified, in the note—*Held*, that the promise to pay the purchase money, being by a distinct and separate instrument, was not dependent upon the covenant to convey, and that B. might maintain an action on the note without offering to convey. *Thompson v. Crutcher*, xxvi. 319.

See COVENANT, 11, 12, 25, 26.

VI. CONDITION PRECEDENT.

35. Where the purchaser of land agreed to pay for it on the delivery to him of the patents, the vendor cannot recover in a court of law, without a compliance with the condition precedent, notwithstanding a subsequent act of Congress renders the tender of the patents impracticable or unnecessary. *Chouteau v. Russell*, iv. 553.

36. Where a party promises to pay a certain sum, "in consideration of their (the promisees) assuming debts of W. W.," to the amount of said sum, the assumption of the debts is not a condition precedent to the payment of the money. The promise is absolute and unconditional. *Overton v. Curd*, viii. 420.

37. Where no time is fixed for the performance of that which is the consideration of the promise, the promise will be considered unconditional. *Per TOMPKINS, J. Ibid.*

38. A party cannot recover for the breach of a stipulation in a contract, unless he has performed all the acts on his part, which were conditions precedent, and is ready to perform those which were to be performed concurrently with the act of the defendant. *Denny v. Kile*, xvi. 450.

VII. DURESS.

39. Where, in a *bona fide* action, the plaintiff caused the defendant to be arrested and imprisoned by legal process, and during his imprisonment the defendant gave a note in settlement of the demand, the plea of duress will not be available, unless an improper use was made of the process, either in wilfully magnifying the amount due to prevent the defendant from procuring sufficient bail for his discharge, or after the arrest by any attempt at extortion. *Holmes v. Hill*, xix. 159.

VIII. SERVICES.

40. In contracts for service, the performance of the entire term is a condition precedent to the right of recovery, unless the contract is abandoned for good cause. And where the servant is discharged for good and sufficient cause, before the close of the term, he cannot recover anything. *Posey v. Garth*, vii. 94. *Schnerr v. Lemp*, xix. 40.

41. Where, in a contract for service, to be terminated at the pleasure of either party, the employer was to furnish the servant with suitable clothing, and he fails to do so, and she quits for that cause, she is entitled to recover what her services were worth. *Sisk v. Cunningham*, viii. 132.

42. Readiness to perform a contract for service on the part of the plaintiff, where he is prevented from doing so by the defendant, without any fault on the part of the plaintiff, is equivalent to a performance for the purpose of maintaining an action; and the contract price for the service is the measure of damages in such a case, unless the defendant reduces them by showing that they were in fact less. But no rule of reduction can be laid down which shall be comprehensive enough to embrace all cases, and yet sufficiently particular to be of practical utility. The burden of proof is on the defendant, and the plaintiff is to be made whole. *Pond v. Wyman*, xv. 175. *Nearns v. Harbert*, xxv. 352.

43. In an action on a note given in advance for the hire of a slave for a fixed period—*Held*, that the master could not recover anything, where he had taken

the slave away from the defendant without legal cause, before the expiration of the contract term of service. *Caldwell v. Dickson*, xvii. 575. *Same Case*, xxvi. 60.

44. In an action for a breach of contract to work for the plaintiff a given time in California, in consideration of an outfit furnished by the plaintiff for the defendant, evidence of the value of the outfit was not properly admissible, this having nothing to do with the measure of damages. *Craighead v. Wells*, xxi. 404.

45. In such case a witness may state what wages he received there per day, as bearing upon the question of the value of labor there. *Ibid.*

46. Where a mother-in-law performed menial service in the house of her son-in-law, it is for the jury to say whether there was an implied contract for compensation. *Smith v. Myers*, xix. 433.

47. Where an employee, wrongfully discharged before the termination of his term of service, brings an action before the expiration of such term, to recover damages for the breach of the contract, it is error to rule that the measure of damages is the contract price of his services for the whole term. *Ream v. Watkins*, xxvii. 516.

See ACTION, 9 ; . . . MASTER AND SERVANT, I ; . . . PLEADING, 130, 131, 143 ; . . . PRACTICE, 60, 159.

IX. ASSIGNMENT, RESCISSION AND DISCHARGE.

48. If one promises to pay a sum of money, and the creditor undertakes, at the same time, to give the debtor employment, to enable him to pay, the failure to give such employment does not discharge the debtor from his obligation. *Beach v. Curle*, xv. 105.

49. A parol contract, while executory, may be rescinded, and such rescission may be inferred from the acts of the parties, and very slight circumstances will be sufficient to show the assent of a party in favor of his own interest. *Fine v. Rogers*, xv. 315.

50. A. executed a note to B. for goods received by C., payable in case C. did not return to St. Louis in fifty days. C. did not return, and B. sued A. on the note. It is no defense to the action that C. subsequently executed a negotiable note to B. for the amount of the bill for the goods, and that B. afterwards told A. he was free, although B. may have sustained no damages from C.'s not returning. *Hempler v. Schneider*, xvii. 258.

51. A contractor engaged in the performance of certain work may assign to another the money to become due to him on the completion of the contract. *Leahy v. Dugdale*, xxvii. 437.

X. ACTION ON.

52. Where work is done under a special contract, the party doing it must comply with the terms of his agreement before he can recover anything, unless prevented from doing so by the act of God, or of the other party. (*Labeaume v. Hill*, i. 42, OVERRULED.) *Helm v. Wilson*, iv. 41.

53. *It seems*, that the work must be done and the contract complied with, both as to time and manner, before the party can recover. *Ibid.*

54. A person who is prevented by the other party from completing his contract, is entitled to recover thereon as if the contract were completed; but cannot abandon the contract and sue on a *quantum meruit*. [*Labeaume v. Hill*, i. 42; *Clendennen v. Paulsel*, iii. 230; and *Helm v. Wilson*, iv. 41—referred to and commented upon.] *Little v. Mercer*, ix. 216.

55. Where there is a special contract in force, a party cannot waive it and recover upon a *quantum meruit* a larger sum than that stipulated in the contract. *Chambers v. King*, viii. 517.

56. No recovery can be had against a county on a *quantum meruit* for erecting a court house; the recovery must be upon the special contract. *Wolcott v. Lawrence County*, xxvi. 272.

57. Where one agrees to construct a plank road, and fails to complete it in the manner prescribed in the contract, he can only recover, if at all, on a *quantum meruit*. The value of the work done, in such case, must be adjusted upon the theory that the work, if completed according to contract, would be worth the contract price. *Barcus v. Hannibal Plank R. Co.* xxvi. 102.

58. Where a party has promised another to pay him money on a given day, in consideration of an act to be performed subsequently to that day, the insolvency or other present inability, of him who is to perform the subsequent act, is no bar to a recovery of the money in an action at law. *Smith v. Busby*, xv. 387.

59. Where a mechanic agrees to build a "good, rough stone wall," and builds one in a very unworkmanlike manner, he can recover nothing for his labor. *Feagan v. Meredith*, iv. 514.

60. Nor will payment of a part of the stipulated price, and a promise to pay the balance, before the defect in the work is discovered, constitute such an acceptance of the work as to impose an obligation on the employer to pay the balance. *Ibid.*

61. A person who contracts to do work for another, and is discharged or prevented from completing it in consequence of his own neglect, cannot recover the whole contract price. *City of St. Louis v. McDonald*, x. 609.

62. Where there is a special contract to do work, and there is a failure to perform it according to its terms, there can be no recovery upon the contract. *Downey v. Burke*, xxiii. 228. *Lowe v. Sinklear*, xxvii. 308.

63. But where labor is performed, and is received by the employer, an obligation is thereby created to pay its reasonable value, taking into consideration and making allowance for the damage resulting from the breach of the contract. *Ibid.* *Ibid.*

64. C. built a boat for P., for which the latter was to pay a stipulated price so soon as there was water enough in the Grand River to let her out—*Held*, that C. could not recover the price till the happening of the contingency named, although P. had, in the meantime, accepted the boat as a good and substantial one, and sold her to a third party. *Peery v. Cooper*, viii. 205.

65. A party cannot maintain an action on a contract procured by fraud. *Denny v. Kile*, xvi. 450.

66. An action will lie to recover back money paid under an illegal contract at any time before the agreement is executed. *Skinner v. Henderson*, x. 205.

67. Where, upon a sale of goods, it is stipulated that a whole or a part of the price thereof may be paid in services to be rendered, this is not the case of a contract in the alternative, but is to be viewed as a means by which the payment of money may be defeated, and is nothing but a defeasance; and after the time limited for payment has elapsed, an action will lie for the price of the goods. *Cook, J., dis. Edwards v. M'Kee*, i. 123.

See PLEADING, 7, 8; . . . USURY, 3.

XI. EVIDENCE.

68. A. had a contract with the Post-Office Department to carry the mail between two points, and B. agreed with him to carry it for a certain sum per annum. In a suit instituted by A. against B. upon this contract—*Held*, that a written contract, signed alone by the Postmaster-General, was competent evidence to prove the fact of a contract between A. and the Department, and that a similar contract between B. and the Post-Office Department, subsequently made, was irrelevant to the issue, and therefore not competent evidence. *Hanger v. Imboden*, xii. 85.

69. The facts appearing in evidence, the understanding of a witness can have no influence in determining the nature of a contract in respect to which he testifies. *Elliott v. Sanderson*, xvi. 482.

70. By the terms of a contract sued on, the defendants were to deliver to plaintiffs broom corn cleaned and baled, ready for shipping, as fast as the same could be prepared by them; the plaintiff was to have the control and direction of the whole work—*Held*, that evidence of defects in machinery, furnished by plaintiff to defendants, which occasioned delay, is competent for defendants in an action for a breach of the contract. *Denny v. Kile*, xvi. 450.

71. A written contract cannot be read in evidence until its execution is proved. *Lewin v. Dille*, xvii. 64.

72. Where the question was whether cattle had died from disease or from plaintiff's want of care—*Held*, that a witness, who had taken cattle to winter from the same drove, might be permitted to state the condition through the winter of the cattle kept by him, what number of them died, in what manner he fed and took care of them, and how many had been affected with disease. *Stonam v. Waldo*, xvii. 489. See SUPRA, 24.

See CHANCERY, 12-39; . . . CONSIDERATION; . . . COUNTY, V; . . . DAMAGES; . . . INFANTS, I.

CONTRIBUTION.

1. The owner of a slave sued the plaintiff as part owner of a boat, and recovered damages against him for the loss of his slave while employed upon the boat as a cook. The plaintiff now sues the defendants, as joint owners with him at the

time of the loss, for an amount of the judgment equal to their interest in the boat—*Held*, that to entitle him to recover, he must establish a state of facts which would entitle the owner of the slave to recover against the owners of the boat. *Cathcart v. Foulke*, xiii. 561.

2. In matters of contract, wherever there is a joint undertaking as principals or sureties, a promise for contribution is raised by implication of law in favor of him who pays the entire debt, against his co-obligor. *Labeaume v. Sweeney*, xvii. 153.

See CHANCERY, 41 ; . . . DEVISE AND LEGACY, 26 ; . . . SECURITIES, VI.

CONVEYANCES.

I. REQUISITES AND VALIDITY.

- a. CONSIDERATION.
- b. SEAL.
- c. EXECUTION BY A CORPORATION.
- d. EXECUTION BY ATTORNEY IN FACT.
- e. PROOF OF EXECUTION.
- f. DELIVERY AND ACCEPTANCE.
- g. ACKNOWLEDGMENT.
- h. REGISTRATION.
- i. NOTICE TO SUBSEQUENT PURCHASERS.

II. CONSTRUCTION AND OPERATION.

- a. GENERALLY.
- b. CONDITIONS, EXCEPTIONS, AND LIMITATIONS.
- c. WHAT ESTATE PASSES BY, AND TO WHOM.
- d. EMBLEMENTS.
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III. EVIDENCE.

- a. DEED.
 - aa. Admissibility.
 - bb. Proof of Contents by Parol.
 - cc. Certified Copies.
 - dd. Boundary. (See *Boundary and Des.*, I.)
- b. PRESUMPTIONS.

I. REQUISITES AND VALIDITY.

a. CONSIDERATION.

1. A deed which does not express a money consideration may be sustained as a deed of bargain and sale by proof of such consideration. *Perry v. Price*, i. 553.

2. A failure to pay a nominal consideration cannot be shown to defeat a deed. *Draper v. Shoot*, xxv. 197.

See ESTOPPEL, 7.

b. SEAL.

3. By the common law, an estate in fee can only be conveyed by deed under seal. *McCabe v. Hunter*, vii. 355.

4. But prior to the adoption of the common law, in 1816, (1 Ter. L. 436,) the laws of Spain, except as controlled by statute, prevailed here, and did not require a seal to an instrument conveying real estate. *Moss v. Anderson*, vii. 337.

5. It was not necessary to convey by deed. *Per* SCOTT, J. *Mitchell v. Tucker*, x. 260.

6. And to make a verbal conveyance valid under the Spanish law, it was not necessary that the vendee should take possession, though taking possession would be strong corroborative evidence of such conveyance. And the statute requiring all deeds and conveyances to be recorded, under a penalty of being adjudged fraudulent and void, against subsequent purchasers and mortgagees, (1. Ter. L. 47, § 8,) did not overthrow this rule of the Spanish law. *Allen v. Moss*, xxvii. 354.

7. An instrument authorizing a party to relinquish all the grantor's right to certain land to the United States, and to select for his own use other lands in lieu of those thus ceded under the Spanish law, is equivalent to an absolute conveyance. *Mitchell v. Tucker*, x. 260.

c. EXECUTION BY A CORPORATION.

8. A deed, regular on its face, from the city of St. Louis, under its corporate seal for a part of its commons, executed under the provisions of the act of March 18, 1835, (2 Ter. L. 501,) is *prima facie* evidence that all the prerequisites of the act have been complied with; and a claimant cannot dispute that they have been complied with unless he holds a conflicting title from the city. *Swartz v. Page*, xiii. 603.

9. An act of the Legislature authorized the Board of Trustees of a town to sell and convey property of the town, and authorized the chairman of the Board to execute the deeds. Under this act, the Board of Trustees passed an ordinance authorizing the chairman to convey lots of a certain size to those inhabitants of the town who had possessed and cultivated the same, upon the establishment of their claims—*Held*, that a deed executed by the chairman, in his own name, was to be considered as the act of an agent appointed by law to perform it, with the concurrence of the corporation, and as such passed the title of the town. *Reilly v. Chouquette*, xviii. 220. *Tigh v. Chouquette*, xxi. 233.

10. And a deed under this statute and ordinance, executed by the chairman acting in good faith, clothed with the formalities of the law, is to be regarded as valid until it is shown that his act was a mere usurpation, founded on no facts warranted by law. No errors of judgment nor mistaken conclusions of law would invalidate it, nor would the fact that the lot conveyed was not the identical one claimed. *Reilly v. Chouquette*, xviii. 220.

d. EXECUTION BY ATTORNEY IN FACT.

11. A deed from A. B. to C. D., executed thus—"J. B. M., (seal) attorney for A. B."—is the deed of the principal, A. B. *Martin v. Almond*, xxv. 313.

e. PROOF OF EXECUTION.

12. Proof of the execution of a deed by a person of the same name is *prima facie* evidence of the identity of the grantor, even though it be shown that there are many others of the same name. *Flournoy v. Warden* xvii. 435. *Gitt v. Watson*, xviii. 274.

13. A deed must go to the jury where a *prima facie* case of execution has been made. The court cannot hear counter evidence and then exclude it from the jury. *Flournoy v. Warden*, xvii. 435.

14. Where a subscribing witness to a deed resides in another State, proof of his handwriting is sufficient. *Little v. Chauvin*, i. 626.

15. Where a deed, executed and attested in the State of Tennessee, the grantor and the attesting witnesses residing there at the same time, is offered in evidence, its execution may be established by proof of the handwriting of the grantor. It will be presumed that the subscribing witnesses are out of the jurisdiction of the courts of this State. *Clardy v. Richardson*, xxiv. 295.

16. And a copy of the record, in the State of Tennessee, of such deed, is inadmissible, unless it appears that such copies are evidence by the laws of Tennessee. *Ibid.*

17. Where a deed purports to have been executed and attested by making a mark or cross, certificate of proof of such a deed cannot be granted under the statute. (R. S. 1845, 223, § 27.) *Allen v. Moss*, xxvii. 354.

f. DELIVERY AND ACCEPTANCE.

18. A deed takes effect from its delivery by the maker to the grantee, and possession thereof by such grantee is *prima facie* evidence of such delivery, but subject to be rebutted by other evidence. *Green v. Yarnall*, vi. 326.

19. The acceptance of a deed by a grantee will not be presumed unless the grant be certainly to his benefit. *Renfro v. Harrison*, x. 411.

20. The delivery of a deed by the grantor, for the purpose of having it recorded, may, under proper concurring circumstances, be regarded as a delivery to the grantee. *Pearce v. Dansforth*, xiii. 360.

g. ACKNOWLEDGMENT.

21. A Circuit Judge has not authority to take an acknowledgment of a deed conveying land situated out of his district; and a deed not properly acknowledged, though recorded, cannot be read as a recorded deed. *Smith v. Mounts*, i. 714.

22. The clerk of the court, in certifying the acknowledgment of a sheriff's deed, need not state that the grantor was personally known to him. (See R. S. 1825, 369, § 21.—R. S. 1855, 748, §§ 57, 58.) *Laughlin v. Stone*, v. 43.

23. Under the act of December 23, 1815, (1 Ter. L. 422,) directing the mode

of taking the acknowledgment or proof of deeds executed by non-residents, a notary public of another State was not one of the officers therein authorized to take the acknowledgment. *Lamarque v. Langlais*, viii. 328.

24. It is not necessary that an officer, in certifying the acknowledgment or proof of a deed, should use the exact words of the statute. A substantial compliance is sufficient. (See R. S. 1835, 121, § 14.) *Alexander v. Merry*, ix. 510.

25. The want of an acknowledgment of a deed does not constitute a defense to an action for the recovery of the purchase money for the land conveyed by it. *Cooley v. Rankin*, xi. 642.

26. The neglect of the officer who took the acknowledgment of a deed to certify that the grantor was known to him, can be objected to only by a subsequent purchaser for a valuable consideration. *Chouteau v. Burlando*, xx. 482.

27. A deed is valid as against the grantor and his heirs, although not acknowledged or proved and recorded. After the death of the grantor in an unacknowledged deed, without a subscribing witness, the grantee cannot maintain a bill against his heirs for a title. If the handwriting of the grantor be proved, the deed will be as effectual against his heirs as if it had been recorded. *Caldwell v. Head*, xvii. 561.

See *INFRA*, 56.

h. REGISTRATION.

28. A sheriff's deed of premises sold by him on execution, which is duly recorded, will prevail against an unrecorded deed from the judgment debtor, although of an earlier date. *Waldo v. Russell*, v. 387.

29. A lien upon real estate attaches from the time of filing a transcript of a judgment rendered by a Justice in the Circuit Court, and will prevail against a deed filed for record at a later hour of the same day. *Jones v. Luck*, vii. 551.

30. A judgment obtained after a mortgage was executed, but before it was recorded, will prevail against such mortgage, and the purchaser at the execution sale will hold against the mortgagee, although he had notice of the mortgage at the time of the sale. *Hill v. Paul*, viii. 479. *Reed v. Austin*, ix. 713. *Frothingham v. Stacker*, xi. 77.

31. But under the R. S. of 1845, a *bona fide* purchaser, who has failed to record his deed until after a judgment is obtained against his vendor, but who causes it to be recorded prior to the execution sale, will hold against the purchaser at such sale. *Davis v. Ownsby*, xiv. 170. *Valentine v. Havener*, xx. 133. *Scott, J., dis.*

32. Under the acts of February 1, 1817, (1 Ter. L. 543,) and December 6, 1821, (1 Ter. L. 797,) requiring certain deeds to be recorded within three months, it is sufficient if they were filed for record in that time. *Harrold v. Simonds*, ix. 323.

33. And under these acts, the three months begin to run from the date of the deed. Of two conveyances unregistered within the time prescribed by the statute, the elder gives the better title. *Draper v. Bryson*, xvii. 71.

34. McC. purchased a lot, and had his deed of it filed for record on the 26th. L., having purchased the same lot from the same vendor, took a deed and had it

recorded on the 27th. McC. withdrew his first deed, had it canceled, and took a second deed, which was recorded on the 27th, after the filing of L's deed for record. L. had notice of the first deed to McC., but not of the second—*Held*, that notice of the first deed was no notice of the second, and that the record is not, under our statute, notice of sale, but only of the conveyance. *Clamorgan v. Lane*, ix. 442.

35. A. purchased land, and, in order to defraud his creditors, had the title made to C. D., without notice of the fraud, acquired title from and under C., but before his deed was recorded, the land was levied upon and sold by the sheriff under an execution against A., and the deed of the sheriff was duly recorded—*Held*, that the registry of a deed is only notice to subsequent purchasers from the same grantor, and that the registry of the sheriff's deed was not notice to D. of that conveyance. *Crockett v. Maguire*, x. 34.

36. A debtor executed and delivered for record a deed of trust conveying certain property, to secure a specified debt. On the same day, the sheriff, by virtue of an attachment, took possession of the same property—*Held*, in a controversy between the attaching creditor and the trustee, that in the absence of any evidence upon the point, the possession of the sheriff is *prima facie* evidence that he seized the property at an earlier hour of the day than the deed of trust was delivered for record. *Pearce v. Dunsforth*, xiii. 360.

37. Under the act of 1817, (1 Ter. L. 543,) a subsequent purchaser, who takes with notice of the prior unregistered deed, cannot take advantage of the failure to record. *Draper v. Bryson*, xvii. 71.

38. And this rule applies to a purchaser at sheriff's sale. *Same Case*, xxvi. 108.

39. A court cannot, by its decree, compel the registry of a deed which the statute does not authorize to be registered. If the grantee apprehends future difficulty in proving its execution, he may perpetuate the testimony under the statute. *Caldwell v. Head*, xvii. 561.

40. The record of a deed not acknowledged or proved as required by law, imparts notice to all persons of the contents of such deed. *Allen v. Moss*, xxvii. 354.

See *INFRA*, 56.

i. NOTICE TO SUBSEQUENT PURCHASERS.

41. Where a purchaser, with notice of title in another, sells to one having no such notice, the latter is not affected by the notice to the former. *Bartlett v. Glascock*, iv. 62.

42. Actual possession of land by the party or his tenant, is notice of title. (See R. S. 1855, 364, § 42.) *Ibid*.

43. But such notice is only constructive. *Frothingham v. Stacker*, xi. 77.

44. The possession is evidence of notice to be submitted to a jury. (R. S. 1845, 226, § 42.) *Vaughn v. Tracy*, xxii. 415. *Same Case*, xxv. 318.

45. The actual notice required by the statute is not certain knowledge, but such information as men generally act upon in the transactions of life. *Per LEONARD, J. Vaughn v. Tracy*, xxii. 415. See *Beatie v. Butler*, xxi. 313.

46. Where the evidence relied on to bring home to a subsequent purchaser actual notice of a prior unrecorded deed is a declaration of such subsequent purchaser to the effect that his grantor had told him before his purchase that the plaintiff (the prior purchaser) "had a mill on the land and would have to move it away now," it is error to instruct the jury that "if the plaintiff was on the acre of ground and mill thereon at the time of the defendant's purchase, and that fact was then known to defendant, it was a sufficient notice in law of the plaintiff's previous purchase, so as to affect the defendant with notice of the plaintiff's title." *Vaughn v. Tracy*, xxv. 318.

47. To constitute a person a *bona fide* purchaser for value, without notice within the rule that protects such a purchaser, the purchase money should be paid before notice is received. *Halsa v. Halsa*, viii. 303. *Paul v. Fulton*, xxv. 156.

48. The fact that a recorder may have entered of record in his office deeds of conveyance of lands subsequently sold and conveyed by himself, raises no presumption that at the time of his own conveyance he was aware of a defect in his title. *Tong v. Matthews*, xxiii. 437.

49. A., by mistake, conveyed to B., whiteacre instead of blackacre—*Held*, that a *bona fide* purchaser for value, from B., of whiteacre, without notice of the mistake, will thereby acquire a good title as against A., and those claiming under him, and a purchaser, without notice of the mistake, at a sheriff's sale on execution against B., will in like manner be protected. *Harrison v. Cachelin*, xxiii. 117.

50. D. purchased land at a public sale, but, by a subsequent arrangement, the deed was made to G.—*Held*, that it was a case of substitution, that D. was not the agent of G. in the transaction, and that notice to him was not notice to G. *Bartlett v. Glascock*, iv. 62. *Evans v. Wilder*, v. 313.

51. B. held an unrecorded deed of certain lands, and stated that he had title to them in the presence and hearing of D., who afterwards purchased them of another party—*Held*, that D. had sufficient notice of B.'s title to put him on enquiry, and that if he purchased without further enquiry, he did so with notice of B.'s title. *Bartlett v. Glascock*, iv. 62. *Mense v. McLean*, xiii. 298.

52. G. died, seized of certain lands, and left a widow and six children, five of whom, with the widow, joined in a conveyance to McC., who paid the full price of the land and went into the possession. The sixth child, (James,) then a minor, on coming of age received his share of the purchase money, and thereafter gave his title bond of his interest in the land to one H., who assigned it to the complainant. Soon after the execution of the bond, James conveyed his interest to McC.—*Held*, that the complainant was not entitled to relief in equity, as the bond gave full notice of McC.'s possession. *Gallagher v. Hunter*, v. 507.

53. The complainant made application at the land receiver's office in St. Louis, to enter a certain tract of land. The clerk in the office, who was also clerk in the register's office, made out and delivered an informal certificate of entry, in a fictitious name, which he signed for the receiver, and at the same time made out a formal certificate, in the same name, which he retained, and which was signed by the register. On this latter certificate an assignment in

blank was indorsed, which purported to be duly executed and acknowledged. The clerk then sold the certificate thus assigned to S., one of the defendants, inserting his name in the blank assignment. S. subsequently procured a patent for the land from the United States. He admitted in his answer that the circuitous mode of transfer adopted by the clerk was prompted by a desire to shield the land from his creditors—*Held*, that having been put upon inquiry he was to be deemed as purchasing with notice, that the purchase was not *bona fide*, and that his legal title inured to the benefit of the complainant. *TOMPKINS, J., dis. Stephenson v. Smith*, vii. 610.

II. CONSTRUCTION AND OPERATION.

a. GENERALLY.

54. Where a deed cannot operate but as the execution of a power, it will be presumed to be so intended, though the power be not referred to in the deed. *Reilly v. Chouquette*, xviii. 220.

55. A deed to the heirs of a person deceased is valid. *Boone v. Moore*, xiv. 420.

56. A deed not acknowledged or recorded, is good as against a mere trespasser. *Strickland v. McCormick*, xiv. 166.

57. A deed is not void if its covenants can be ascertained by an examination of the whole instrument, although some isolated covenant may be uncertain and difficult to understand when not connected with the other parts of the deed. *Gregg v. Macey*, x. 385.

58. A. conveyed an estate to B., in fee, with a covenant for quiet enjoyment, and also covenanted to surrender part of the estate conveyed, on the happening of a certain event—*Held*, that this latter clause did not authorize A. to hold until the event happened, but that B. was entitled to immediate possession. *Grimsley v. White*, iii. 45, 257.

59. Where a deed, wanting words of perpetuity, is written on the back of another deed conveying an estate in fee, and contains these words, "have sold, ceded, released and transferred all their part of the land sold by their co-heirs in the sale above"—*Held*, that this reference does not enlarge the life estate conveyed to a fee simple. *Reaume v. Chambers*, xxii. 36.

60. The rule that deeds must be construed most strongly against the grantor, though applicable to indentures, should not be resorted to until all other rules of construction fail. *Biddle v. Vandeventer*, xxvi. 500.

b. CONDITIONS, EXCEPTIONS AND LIMITATIONS.

61. If there be a limitation in a deed on the power to sell an estate for twenty-five years, the legal age of majority at the time of making it, a subsequent change in the law, making twenty-one instead of twenty-five years, the age of majority, cannot affect the limitation. *Dougal v. Fryer*, iii. 40.

62. The stipulation in a deed that it shall be void, if the purchase money is

not paid at a specified time, is for the benefit of the grantor and may be waived by him, and when waived by an acceptance of the money, a third party cannot take advantage of it. *Ibid.*

63. An exception in a deed, which embraces the entire premises which it assumes to convey, is nugatory and void. *Bogy v. Shoab*, xiii. 365.

64. A clause in restraint of alienation, in a deed containing apt words to pass an estate in fee, will be rejected, and the deed held to pass an absolute estate in fee to the grantee, and not merely a life estate, remainder to his heirs. *McDowell v. Brown*, xxi. 57.

C. WHAT ESTATE PASSES BY AND TO WHOM.

65. Administrators sold land to G., under an order of court to pay debts, and gave him a bond to convey on payment of the purchase money. Before the purchase money was paid, G. sold and conveyed the land to B., who went into possession. The land was afterwards sold on execution against G., for the purchase money, and the purchaser at the sheriff's sale paid the purchase money—*Held*, that G. had no title subject to sale on execution, and that, as the purchase money was paid, there was no lien on the land for that; that no title was acquired by the sheriff's sale, and that B. was entitled to the land both in law and equity. *Bartlett v. Glascock*, iv. 62.

66. A deed conveying "all the right, title, claim and interest of the grantor, both at law and equity, to block No. 25, which property formerly belonged to J. C., and was handed down from him to his children, and willed by his son C. to the said grantor," conveys only the interest which the grantor had in the block, under the will of C., when the grantor had also an interest in it, derived from a source distinct from the will. *Clamorgan v. Lane*, ix. 442.

67. A deed conveying a tract of land subject to the conditions of an agreement by which the vendor is bound to convey one-half the land to a third party, vests the legal title to the whole tract in the vendee, who will stand in the same position in reference to such third party as did the vendor. *Evans v. Labaddie*, x. 425.

68. Under the statute, (R. S. 1835, 119, § 3,) the title acquired by an entry with the Register and Receiver of a U. S. Land Office, on which no patent has issued, will pass to the grantee in a deed purporting to convey the land in fee simple absolute, made before such entry by the person entering the land. *Scott, J., dis. Ibid.*

69. Prior to the statute modifying the common law, (R. S. 1845, 219, § 2,) it was necessary to use the word "heirs" in a deed in order to convey a fee simple estate. *Hogan v. Welcker*, xiv. 177. *Leitensdorfer v. Delphy*, xv. 160.

70. In a release between joint tenants or coparceners, a fee will pass without words of limitation. Conveyances between tenants in common cannot operate by way of release, and must contain the word "heirs" to pass a fee. *Rector v. Waugh*, xvii. 13.

71. A. made a parol contract to convey a piece of land, to which he had a legal title, to his father, but his father died before a conveyance was made. He afterwards conveyed "all his right, title and interest" in the land to another,

giving him notice what contract he had made with his father—*Held*, that the conveyance passed only his interest as heir to his father. *Farrar v. Patton*, xx. 81.

72. A conveyance of real estate to W. W. P. & Co., only operates to pass the legal title to W. W. P. *Arthur v. Weston*, xxii. 378.

73. September 20, 1832, William Christy, and his wife, Martha T., conveyed four lots to their two sons, Edmund and Howard, by separate boundaries, two lots to each, *habendum* thus: "to have and to hold the premises aforesaid, with all the appurtenances thereto belonging, to them and their heirs forever, upon condition that, should either of the grantees herein named die without leaving legal heirs of their body, the survivor shall inherit the whole of the property hereby conveyed; and should both grantees die without leaving legal heirs as aforesaid, the property hereby conveyed shall revert to the other legal heirs of said William and Martha T." Edmund died without issue in 1840, and the heirs of William and Martha subsequently released all their "right, title, interest, estate and expectancy" in the aforesaid premises to Howard, and he thereupon executed to Jas. T. Sweringen and wife, (Mrs. S. being one of the heirs of William and Martha Christy,) a bond in the penal sum of \$3,000, with a condition thereto, in which was recited the conveyance of September 20, 1832, and the release of the heirs to Howard, and which then concluded in these words: "now if the said contingency in the first deed mentioned shall happen, whereby the said obligees, or their heirs, would have been entitled, by virtue of said first mentioned deed, to said property, or any part thereof, or any interest in the same, had not said release been executed, and the said Howard F. Christy, his heirs, executors or administrators, shall well and truly pay to the said James T. Sweringen and Martha, his wife, their heirs, executors, administrators, or assigns, the value at the time of happening of said contingency, of the portion, part or interest which the said Sweringen and wife, their heirs, executors or administrators would have been entitled to in said property in said first deed described, by virtue of said deed, had not the said release been executed, then this obligation shall be void, otherwise shall remain in full force and virtue." Howard died without issue in 1853—*Held*, 1st, that construing the deed of September 20, 1832, with reference to the rules of the common law, Edmund T. Christy and Howard F. Christy would have each become seized in fee tail of the two lots granted to each respectively; 2d, that by the operation of the statute of 1825, (R. S. 1825, 216, § 4,) the estates tail that would have vested, but for said statute, in Edmund and Howard respectively, were cut down and destroyed, Edmund taking a life estate only in the two conveyed to him; and Howard a life estate only in the two lots conveyed to him, that a remainder in Edmund's two lots immediately passed in fee simple absolute to Howard, (subject, however, to be divested by the birth of issue of Edmund,) that a remainder in Howard's two lots passed in fee simple absolute to Edmund, (subject to be divested by the birth of issue of Howard,) that the remainder in Howard's two lots, which vested in fee simple absolute in Edmund, descended upon his (Edmund's) death to his heirs general, of whom Mrs. Sweringen was one; 3d, that, consequently, there was a good cause of action on said bond, inasmuch as the release above mentioned was effectual to transfer to Howard an interest that had vested in Mrs. Sweringen in

two of the four lots embraced in the deed of September 20, 1832; 4th, that defendants were not estopped to deny that Mrs. Sweringen took an interest in said lots under the limitations of the deed of September 20, 1832; 5th, that no recovery could be had beyond the penalty of the bond. *Farrar v. Christy*, xxiv. 453.

d. EMBLEMENTS.

74. Growing wheat is a part of the freehold, and passes with the land on which it is sown; and parol evidence is not admissible to contradict a deed conveying the land and show that it did not pass. *McIlwaine v. Harris*, xx. 457.

e. ENUREMENT AND ESTOPPEL.

75. Under the statute of 1825, relating to conveyances, (R. S. 1825, 217, § 6,) a quit claim deed is not sufficient to transfer to the grantee the legal title subsequently acquired by the grantor. But where the grantor makes a deed, purporting to convey a fee simple absolute, that is, an indefeasible estate, and at the time had no title whatever, either legal or equitable, a subsequently acquired legal title by the grantor, will enure to the grantee. *Bogy v. Shoab*, xiii. 365.

76. A husband and wife executed a deed, by which they "*bargained, sold and quit claimed*" to the grantee and his heirs "all their right, title, interest, estate, claim and demand, as well in possession as in expectancy, of, in and to" a specified tract of land. The wife, at the time, had an interest in the land, upon which the deed might have operated, if it had been properly acknowledged—*Held*, that a title subsequently acquired by the husband, by purchase, did not, under the statute, (R. S. 1825, 217, § 6,) enure to the grantee. *Valle v. Clemens*, xviii. 486.

77. Tenants in common executed mutual deeds of partition, with covenants of warranty. Afterwards, the title to the land held in common proved to have been defective. Neither grantee under the deeds of partition had any claim to the estate subsequently conveyed by his grantors, under an after acquired title, to another person, on the ground that they are estopped by their covenants of warranty, and that the after acquired title enures, by virtue of the warranty, to his benefit. *Rector v. Waugh*, xvii. 13.

78. No principal of the Spanish law is known making an after acquired title enure to the benefit of a former grantee. *Norcum v. Gaty*, xix. 65.

79. The statute relating to conveyances, (R. S. 1845, 219, § 3,) does not embrace leasehold estates, and a subsequently acquired title therein will not pass to the grantee in a deed of trust of such estate. *Geyer v. Girard*, xxii. 159.

80. In 1826 A. conveyed to B. all the land embraced in a certain Spanish concession, "except that heretofore sold by him," and warranted the same free from the claims of himself and all persons claiming under him, except those who then had deeds of record. Previous to the execution of this deed, in 1818, A. conveyed to his son C. a portion of said concession by a deed which was duly recorded the day of its execution. In 1826 both A. and B. acted as if the deed to C. had no existence, and A., by many acts and declarations, indicated that he intended, by the deed of 1826, to convey the land embraced in the deed of 1818.

In 1838 A. procured a re-conveyance from his son C. of the parcel conveyed to him in 1818, which re-conveyance was recorded in 1845, and the same year A. conveyed the land thus re-conveyed to him, to D. B.'s assignees entered into the possession of the tract in 1831, and continued in possession, dealing with it as their own until ejected by D.—*Held*, that the deed of 1838 did not enure to the benefit of B.'s assignees; that no estoppel could be worked as against A., B. and his assignees having been guilty of gross negligence in not examining the records to discover what conveyances had been made by A. and placed of record previous to the execution of the deed of 1826. *Picot v. Page*, xxvi. 398.

f. ERASURE.

81. The law presumes an erasure or interlineation of an instrument to have been made before signing, unless there are grounds of suspicion upon its face. *Matthews v. Coalter*, ix. 696.

g. CANCELLATION.

82. The cancellation or destruction of a deed conveying land will not re-vest the title of the alienee in the alienor, although it may be done by mutual consent and with a view to that object. *Tibeau v. Tibeau*, xix. 78.

83. A. conveyed to B., by deed, and delivered to him, a slave, in trust, to appropriate its hire to A. for life, and then to deliver it to his son—*Held*, that the son acquired an interest under this conveyance that could not be destroyed by any arrangement entered into between A. and B.; and that A. could not, as against his son, without his consent, resume the entire ownership of the slave. *Lawrence v. Lawrence*, xxiv. 269.

III. EVIDENCE.

a. DEED.

aa. *Admissibility.*

84. Prior to 1825, (R. S. 1825, 222, § 16,) a deed was not admissible in evidence on the mere certificate of acknowledgment and registry, without further proof of execution. *Miller v. Wells* v. 6.

85. Where the wife joins her husband in the execution of a deed, for the purpose simply of releasing her right of dower, and that appears upon the face of the deed, it is not necessary to prove her handwriting in order to its admissibility in evidence, where the right of dower is not necessarily in issue. *Brown v. Cleaveland*, v. 65.

bb. *Proof of Contents by Parol.*

86. A deed having been made for the performance of an illegal contract, was, by consent of parties, destroyed, and the contract treated as rescinded. In an action to recover back the money paid under the contract, evidence of the contents of the deed is admissible. *Skinner v. Henderson*, x. 205.

See EVIDENCE, 71-79.

cc. *Certified Copies.*

87. Under the statute, (R. S. 1855, 365, § 46,) certified copies of deeds of conveyance may be read in evidence, upon proof that the originals are not "within the power" of the party offering such copies, that is, not within his control or possession, nor of his agent, servant or bailee. *Barton v. Murrain*, xxvii. 235.

88. But where deeds, conveying portions of the military bounty land in this State, are executed in other States of the Union, and acknowledged and proved in accordance with the laws and usages of such States, and not in accordance with the statutes of this State, certified copies of such deeds can be read in evidence only upon proof of the loss or destruction of the original. (R. S. 1855, 366, §§ 51, 55.) *Ibid.*

89. And the loss of such instruments will be presumed, if it appear that search has been made in the proper places and by the proper persons, and that they cannot be found after due diligence has been used in looking for them. *Ibid.*

dd. *Boundary*.—See BOUNDARY AND DES., I.

See CORPORATION, IV; . . . PLEADING, 83–87.

b. PRESUMPTIONS.

90. The presumption of a deed of conveyance from facts and circumstances, without the production of the instrument, or any direct proof of its existence, and which juries are sometimes permitted to make, and, if the facts warrant, directed to draw, is a disputable and not a conclusive presumption. *Dessaunier v. Murphy*, xxii. 95.

91. And the doctrine of presuming conveyances rests mainly upon long and uninterrupted possession in the owners of the title in favor of which the presumption is indulged; if this possession be had, not under the title in favor of which such a presumption is invoked, but under another title not shown to be owned by the person so invoking it, a conveyance will not be presumed to supply the defect. *Same Case*, xxvii. 48.

92. Where the possession of land by a party in whose favor it is sought to invoke the presumption of a deed, is entirely consistent with title in another—as where a father (in whose behalf the presumption is invoked as against his son and the son's heirs,) is in possession of land during the minority of the son, or after the death of the son, at which time the law devolved a life interest in the land of the son upon the father—such possession will not authorize the presumption of a conveyance. *Watson v. Bissell*, xxvii. 220. See EVIDENCE, 7.

See DOWER, 30; . . . ESTOPPEL, II; . . . EVIDENCE, 109–111; . . . EXECUTION, XIV; . . . HUSBAND AND WIFE, IX; . . . INFANTS, II; . . . SLAVES AND SLAVERY, 29–32; . . . WARRANTY, III.

CORPORATION.

- I. CHARTER.
- II. POWERS.
- III. CAPITAL STOCK.
 - a. CALLS.
 - b. TRANSFER.
- IV. SEAL.
- V. SUITS BY AND AGAINST.
- VI. LIABILITY OF CORPORATION.
- VII. LIABILITY OF DIRECTORS.
- VIII. LIABILITY OF STOCKHOLDERS.
- IX. FOREIGN CORPORATIONS.
- X. MUNICIPAL CORPORATIONS.
 - a. CHARTER.
 - b. POWERS.
 - c. ACTION BY AND AGAINST.
 - d. SANITARY REGULATIONS.
 - e. STREETS.
 - f. WHARVES.
 - g. EXHIBITING ANIMALS.

I. CHARTER.

1. A violation of its charter by a bank, cannot be taken advantage of collaterally or incidentally, but it must be brought up on a proceeding instituted for that purpose against the corporation. *Bank of Missouri v. Merchants' Bank of Baltimore*, x. 123.

2. Although the powers conferred on a corporation by its charter cannot be divested by legislation, yet, except so far as they are privileged by their charter, they are subject to the general laws, and their contracts in violation of them are voidable, or may be made void by law. *Blair v. Perpetual Ins. Co.* x. 559.

II. POWERS.

3. A corporation can exercise only the powers expressly granted by its charter, or necessary to carry out some express power. *Ibid.*

4. A corporation has power to make any contract authorized by its charter in a foreign government, if such contract be not prohibited by that government. *Ibid.*

5. A corporation created for the purpose of insuring property, has no power to engage in the business of banking. *Ibid.*

6. Where a corporation, expressly restrained from exercising any banking privileges, but having the right to receive notes in the way of business, offered a note as a set-off in a suit—*Held*, that the presumption was, that the note had

been properly received by the corporation, till the contrary was proved by the plaintiff. *Hart v. Missouri State Mutual Fire and Marine Insurance Co.* xxi. 91.

III. CAPITAL STOCK.

a. CALLS.

7. Under the act of 1851, authorizing the formation of associations to construct plank roads, &c., (Acts 1850-1, 259,) a stockholder, who assists in the organization of the company, cannot avoid the payment of stock subscribed by him, on the ground that the company was not organized in strict conformity to the requirements of that act; nor on the ground that no legal notice was given of the election of directors. *Central Plank Road Co. v. Clemens*, xvi. 359.

8. Nor is it a defense to a suit for an instalment upon stock subscribed in such a company, that there has been a departure from the route proposed in the articles of association. *Ibid.*

9. The charter of the Pacific Railroad Company (Acts 1848-9, 219,) was granted, subject to the general statute relating to corporations, which provides that the charter of every corporation thereafter granted "shall be subject to alteration, suspension and repeal in the discretion of the legislature," (R. S. 1845, 232, § 7.) Two acts were afterwards passed, one authorizing the company to issue mortgage bonds, (Acts 1850-1, 265,) and the other to alter the route of the road, (Acts 1850-1, 268.)—*Held*, that a subscriber for stock under the original charter, was liable for the calls upon his stock. *Pacific Railroad v. Renshaw*, xviii. 210. As to liability of stockholder after passage of Acts of Dec. 25, 1852. (Acts 1852-3, 10, 363.) *Same v. Hughes*, xxii. 291.

10. *Quære*—Whether he would be so liable if the alterations by the legislature extended to an entire change of the character and objects of the corporation? *Pacific Railroad v. Renshaw*, xviii. 210. See *INFRA*, 12.

11. The defendant subscribed for a share of stock in a telegraph line, there being annexed to the subscription a stipulation, among others, by which a committee was appointed "to see that the stipulations are and will be complied with before the subscriptions are paid"—*Held*, that the action of the committee was not a condition precedent to a recovery of the price of the stock. *Shaffner v. Jeffries*, xviii. 512.

12. Legislative changes in the charter of a railroad company, which consist only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute substantially the original object of its creation, will not discharge one who has previously subscribed to its stock from his liability for calls thereon. *Pacific Railroad v. Hughes*, xxii. 291.

13. The fact that the directors of an incorporated company have violated the provisions of its charter, will not release a subscriber from his liability to pay calls made upon his subscription to the capital stock. *Hannibal Plank Road Co. v. Menefee*, xxv. 547.

b. TRANSFER.

14. A transfer of stock, made according to the general law governing the transfer of personal property, is good between the parties, though it would not be as against the company. *Perpetual Insurance Co. v. Goodfellow*, ix. 149.

15. The word "indebted," when used in a by-law or charter, restraining a stockholder from transferring his stock while indebted to the company, applies to debts maturing as well as those due, and to those in which the stockholder is surety as well as those in which he is principal. *Ibid.*

16. The provisions of a charter declaring the stock of a corporation personal property, and authorizing the board of directors to make rules and regulations concerning the transfer of the stock, subject to the general law of the State, authorizes the board to adopt a rule prohibiting the transfer of stock, until all debts due by the owner of the stock to the corporation shall be paid, although such rule is inconsistent with the general law of the State governing the transfer of personal property. *Ibid.*

17. In the charter of a corporation it was provided, that the stock might be "transferred on the books of the company," the company was empowered "to regulate the transfer of stock" by by-laws, and in certain cases to make assessments on stockholders for raising funds for purposes of improvement or purchasing lands in such amount as they may deem proper—*Held*, that the company could not make an assessment on any one who had ceased to be a member by transferring his stock; that the power "to regulate the transfer of stock" did not include the power to prevent transfers, nor to prescribe to whom the owner may sell, or to whom not, or on what terms; and that an assignment "on the books of the company" changed the ownership without obtaining a new certificate, and an assignment on a separate paper, notice being given to the company, was valid against them. *Chouteau Spring Co. v. Harris*, xx. 382.

IV. SEAL.

18. The act of incorporation of the Bank of Missouri provided that the president, &c., and their successors and assigns, by the name of the president, &c., may have a common seal, and may make, change and alter the same at their pleasure. (Gey. Dig. 74, § 1.)—*Held*, that the Bank, in making a conveyance, must use a common seal. A deed of conveyance, made by the Bank with no other seal than a plaster of wax, without an impression upon it, is of no validity. *Perry v. Price*, i. 645.

19. If the common seal of a corporation is affixed to a deed, it must be proved to be the common seal of the corporation, and if another than the common seal is used, it must first be proved that the corporation in council agreed and ordered such seal to be used in that particular instance, and then it must be proved that the officer whose duty it may be to affix the seal, did do so. *Perry v. Price*; REHEARING, i. 664.

20. An indorsement upon the deed, signed by a majority of the directors, to

the effect that they "the directors, &c., hereby ratify and confirm the execution of the foregoing instrument of writing," &c., is not such an adoption of a smooth plaster of wax as to make it the *seal* of the corporation. The instrument not being the *deed* of the corporation before, this ratification does not make it so. *Ibid.*

V. SUITS BY AND AGAINST.

21. Where the legislature grants to individuals a corporate capacity upon the performance of certain acts, a party contracting with them in their corporate name, cannot deny the performance of the acts prescribed. *Hamtramck v. Bank of Edwardsville*, ii. 169.

22. Legal proceedings against a corporation are not affected by the expiration of its charter *pendente lite*. *Lindell v. Benton*, vi. 361.

23. Where an obligation is executed to two corporations jointly, they may sue thereon jointly. *Per* SCOTT, J. *Gathwright v. Collaway Co.*, x. 663.

24. If the record does not show the nature of the transaction in which a corporation became the indorsee of a promissory note, it will be presumed that the note was acquired by it within the provisions of its charter. *Roussin v. Perpetual Insurance Co.*, xv. 244.

25. An action for malicious prosecution, slander, false imprisonment, or assault and battery, cannot be maintained against a corporation aggregate, but must be brought against the individuals implicated, personally. *Childs v. Bank of Missouri*, xvii. 213.

See SET-OFF, 27; ···· WITNESS, 100.

VI. LIABILITY OF CORPORATION.

26. The acts of the directors of a corporation, in order to bind it, must be done in their official capacity. *Barcus v. Hannibal Plank Rd. Co.*, xxvi. 102.

VII. LIABILITY OF DIRECTORS.

27. Under the statute of 1845, (R. S. 1845, 235, § 20.) the directors of an incorporated company are not liable to the stockholders for the excess of the indebtedness of the company, contracted during their administration, over the amount of the capital stock paid in. *Kritzer v. Woodson*, xix. 327.

28. And the directors are not liable to any person, unless it is expressly charged, that the indebtedness existing at one time exceeded the stock paid in. *Ibid.*

VIII. LIABILITY OF STOCKHOLDERS.

29. A demand against a corporation for damages for the loss of a steamboat through the negligence of its agents, is not a debt of the corporation, within the

statute, (R. S. 1845, 234, § 18.) which makes the stockholders, jointly and severally, liable, if the corporation fails to give notice annually of all its "existing debts." *Cable v. McCune*, xxvi. 371.

IX. FOREIGN CORPORATIONS.

30. A corporation existing under the laws of another State, may maintain an action in the courts of this State. *Per Cook, J. Bank of Edwardsville v. Simpson*, i. 184.

See ATTACHMENT, 34.

X. MUNICIPAL CORPORATIONS.

a. CHARTER.

31. A petition to change the charter of an incorporated town, signed by two-thirds of the corporators, and a second order of incorporation by the County Court in pursuance of the petition, together with a subsequent election of town officers under the new charter, is evidence to be left to the jury, from which they may infer a surrender of the first and an acceptance of the second charter. *Sellick v. Inhabitants of Fayette*, iii. 99.

b. POWERS.

32. An act incorporating a town, and vesting the authorities of the town with certain powers, does not divest the State or County Courts of powers invested in them by a general law, unless the act of incorporation declares the powers vested in the corporation to be exclusive. *Baldwin v. Green*, x. 410.

33. Under the common law, a municipal corporation has power to take and hold personal property. *Christy v. City of St. Louis*, xx. 143.

c. ACTION BY AND AGAINST.

34. In an action of ejectment brought by the city of St. Louis, for a lot purchased by it, the defendant cannot set up the irregularity of the ordinance authorizing the purchase. The acceptance of the deed by the city vests the legal title in it, whether the ordinance is valid or void. *McIndoe v. City of St. Louis*, x. 575.

35. In an action in favor of A. and B., on a note payable to the "trustees of the town of Dover," it is competent for plaintiffs to prove by parol that they were such trustees, and that the note was given to them by that name. *Yantis v. Yourie*, x. 669.

36. In a proceeding to recover a fine for the violation of a city ordinance, it is not necessary for the statement to be drawn with such particularity as is necessary in an indictment. It is sufficient to inform the defendant of what he is called upon to answer. *City of St. Louis v. Smith*, x. 438.

37. Where a note is executed to another for the use of a county, suit upon it must be brought in the name of the person to whom it is made payable, and not in the name of the county. (See R. S. 1845, 289, §§ 3, 4.) *Linn County v. Holland*, xii. 127.

38. An action may be maintained in the name of the county upon a note payable to the county, to the use of the State school fund. *Barry County v. McGlothlin*, xix. 307.

See LIMITATIONS, 9, 26 ; . . . MASTER AND SERVANT, 5.

d. SANITARY REGULATIONS.

39. A city ordinance, giving the board of health a general supervision over the health of the city, includes the power to rent a building to be used as a hospital, to protect the city from the infection of cholera. *Aull v. City of Lexington*, xviii. 401.

e. STREETS.

40. A municipal corporation is not liable to an action for damages consequential upon the grading and paving of a street or alley, directed by the corporate authority, in pursuance of an ordinance authorized by its charter. *BIRCH J. dis. City of St. Louis v. Gurno*, xii. 414. *Lambar v. City of St. Louis*, xv. 610.

41. Nor where such street or alley has been dedicated to the public use by the proprietor. *Taylor v. City of St. Louis*, xiv. 20.

See LAWS, 43 ; . . . LOCAL DECISIONS, 12.

f. WHARVES.

42. A municipal corporation, authorized by charter to construct wharves and other similar public conveniences upon the lands of private citizens, are not bound to accept the offer of the owners of the land, to make such improvements at their own expense, subject to the control of the corporation. *Waddingham v. City of St. Louis*, xiv. 190.

g. EXHIBITING ANIMALS.

43. A fine for exhibiting a caravan of animals within the limits of a corporation, before any corporation ordinance existed on that subject, is in the nature of a judicial sentence, and therefore illegal. *Sellick v. Inhabitants of Fayette*, iii. 99. See LOCAL DECISIONS ; . . . ST. LOUIS ; . . . TOWNS.

See CONVEYANCES, 8-10 ; . . . EVIDENCE, 16 ; . . . EXECUTION, 20 ; . . . GARNISHMENT, 5, 6, 8, 9 ; . . . JUDGMENT, 9 ; . . . JURISDICTION, 51 ; . . . LAWS, 17, 18.

COSTS.

- I. SECURITY FOR.
- II. IN SUITS IN CIRCUIT COURT COGNIZABLE BEFORE A JUSTICE.
- III. NON-RESIDENTS.
- IV. TAXATION.

- a. GENERALLY.
- b. ACTIONS EX DELICTO.
- c. ADMINISTRATION.
- d. APPEAL.
- e. ATTACHMENT.
- f. CHANCERY.
- g. CONDEMNATION OF LAND TO PUBLIC USE.
- h. FERRY.
- i. GUARDS AROUND JAIL.
- j. LIBEL AND SLANDER.
- k. OFFICIAL BOND.
- l. PARTITION.
- m. REPLEVIN.
- n. TENDER.
- o. TRIAL OF RIGHT OF PROPERTY.
- p. VAGRANTS.

I. SECURITY FOR.

1. Under a statute requiring in certain cases a bond to be given "to pay, or cause to be paid, all the costs which may accrue in such action," (1 Ter. L., 843, § 3,) a bond for the payment "to the defendant, and to the several officers of the court, and to all others interested, all costs which may be awarded to be paid by said B.," is sufficient. *Baggs v. Lanning*, i. 261.

2. If the plaintiff fails to file security for costs, agreeably to an order of court, his suit will be dismissed, and he adjudged to pay costs. *Evans v. Hays*, ii. 184.

3. A party cannot be compelled to dismiss his suit for failing to give security for costs, until an order to that effect is made. *Morrow v. Shepherd*, ix. 213.

4. The sureties in a rejected bond for costs are discharged, upon the dismissal of the suit, because of the plaintiff's failure to file an approved bond. *Hollinsworth v. Matthews*, xix. 406.

See PRACTICE, 11, 116, 117, 287.

II. IN SUITS IN CIRCUIT COURT COGNIZABLE BEFORE A JUSTICE.

5. The defendant will recover costs in a suit brought to the Circuit Court on a demand which had been reduced below the jurisdiction of a justice by direct payments before the suit was commenced. *Evans v. Hays*, ii. 97.

6. In an action of trespass for an assault and battery, commenced in the Circuit Court, the plaintiff will recover costs, although the recovery is for less than

fifty dollars damages. (R. S. 1825, 228, § 12—473, §§ 1, 34.) *Hayden v. Sloan*, iii. 328.

7. In an action of trover in the Circuit Court for the value of a horse, the witnesses testified that the horse was worth from fifty to seventy-five dollars. A verdict was returned for thirty dollars, and judgment given against the plaintiff for costs—*Held*, that the verdict was against the evidence, and justified a new trial, and that the court did not exercise a sound discretion in giving judgment against the plaintiff for costs, under § 11, of the act relating to costs. (R. S. 1825, 227.) *Hays v. Thomas*, iii. 335.

8. To an action of assumpsit the defendant pleaded the general issue and a set-off. The cause was referred to arbitrators, who awarded in favor of the plaintiff a sum below the jurisdiction of the court, and his costs—*Held*, that the plaintiff was entitled to costs under the statute regulating arbitrations and references, (R. S. 1825, 137, § 1.) as also, under the act relating to set-off. (R. S. 1825, 738.) *Burton v. Martin*, iv. 200.

9. Where the plaintiff sued in the Circuit Court on an account of over one thousand dollars, but recovered by verdict less than ninety dollars—*Held*, that he could recover no costs, and that each party should pay his own. (See R. S. 1825, 227, § 11.) *Jones v. Relfe*, v. 542.

10. Where the plaintiff sued in assumpsit in the Circuit Court, to recover for medical services, claiming three hundred dollars, and obtained verdict for eighty-four dollars and twenty-five cents—*Held*, that the Circuit Court, under the statute (R. S. 1835, 155, § 8.) had concurrent original jurisdiction with a Justice, and that the plaintiff was entitled to costs. (R. S. 1835, 129, § 14.) *Talbot v. Greene*, vi. 458.

11. Prior to the act of 1841, (Acts 1840—1, 102,) relating to Justice's courts, judgment for costs should be rendered against the plaintiff where he sues in the Circuit Court on a demand within the jurisdiction of a Justice. (R. S. 1835, 348, § 4.) *Ashby v. Glasgow*, vii. 320.

12. Plaintiff brought suit in the Circuit Court and recovered twenty-five dollars—*Held*, that, as the suit was properly cognizable before a Justice, the plaintiff could not recover costs. (R. S. 1835, 129, § 14.—348, § 4.) *Day v. Hornbuckle*, viii. 37.

13. The statute providing that costs shall be adjudged against the plaintiff where the amount claimed is below the jurisdiction of the court, (R. S. 1845, 243, § 12,) does not apply where the declaration shows a claim below the jurisdiction of the court, and the legality of the proceedings was questioned by demurrer before judgment. *The State v. Steel*, xi. 553.

14. The plaintiff petitioned, under the new code, for damages for the breach of a contract, and to procure the cancellation of a note given pursuant to the contract. The jury gave the plaintiff a verdict for \$12 33, and the note was ordered to be given up—*Held*, that the costs should be taxed against the defendant. *Scott, J., dis.* *Stewart v. See*, xxi. 513. *Skinner v. See*, xxi. 517.

15. Where the defendant offered, under the statute, (Acts 1848—9, 97, § 1,) to allow judgment to be taken for a certain sum, which offer was accepted and judgment entered accordingly, the defendant is not entitled to costs, although the

sum for which judgment is thus allowed is below the jurisdiction of the court. *Lee v. Stern*, xxii. 575.

See MECHANIC'S LIEN, 31, 32.

III. NON-RESIDENTS.

16. Under the provisions of the act which provides that in certain actions a non-resident shall file security for costs before he institutes suit, (R. S. 1825, 225, § 1,) it was *held*, that the bond required may be filed after the institution of the suit, and that it is error to overrule a motion on the part of the plaintiff to be permitted to file bond and security for costs. *Governor v. Rector*, i. 638. *Posey v. Buckner*, iii. 604. *Snowden v. McDaniel*, vii. 313.

17. Where, in a suit by a non-resident who failed to give security for costs, a motion is made to dismiss for want of such security, within the time allowed the defendant to plead, and before any pleading is filed by him—*Held*, that the effect of the motion to dismiss was to suspend all further proceedings until it was disposed of, and that judgment by default could not be entered for want of a plea until the motion to dismiss was disposed of. *St. Bt. Osprey v. Jenkins*, ix. 635.

18. Judgment for costs is properly entered against the security in the bond of a non-resident plaintiff who is non-suited. *Hamiltons v. Moody*, xxi. 79.

IV. TAXATION.

a. GENERALLY.

19. The plaintiff will recover costs up to the time of filing a plea *puis darrein continuance*. *Nettles v. Sweazea*, ii. 100.

20. The court has no power to order parties, while the suit is pending, to divide between them and pay the costs for clerk hire in taking an account in the case. The costs of the account should abide the event of the suit. *Carroll v. Hardy*, xxi. 66.

b. ACTIONS EX DELICTO.

21. In actions of trespass, if any damages are recovered, the plaintiff recovers costs. (R. S. 1835, 129, § 13.—348, § 4.) *Grant v. Brinegar*, vi. 450. *Bragg v. Brooks*, viii. 40.

22. In all actions *ex delicto*, the damages claimed in the declaration shall determine the jurisdiction of the court; and if the plaintiff recovers any damages, he is entitled to costs. (R. S. 1845, 243, § 11.) *Acks v. Ball*, xiv. 396.

c. ADMINISTRATION.

23. A suit may be brought against an administrator in the County Court, on a demand allowed against the estate of the deceased, within one year from the granting of administration thereon, without the plaintiff being liable for costs on

recovery; but it is otherwise if the suit is brought in the Circuit Court. (See R. S. 1825, 111, § 49.) *Gibbs v. Mann*, iv. 55.

24. Where administrators who are also heirs at law sue in the latter character for property belonging to the estate, when they might have sued in their representative capacity, they will not be allowed the costs of such suit out of the estate. *Hughes v. Hughes*, viii. 38.

25. The general rule of law as to the liability of executors and administrators for costs is, that where the cause of action accrued to the testator or intestate in his lifetime, then the administrator or executor, suing and failing to recover, is not liable for costs *de bonis propriis*; the judgment for costs will be *de bonis testatoris*; but where the cause of action accrues to the executor or administrator, and he sues and fails to recover, he shall pay costs himself. *Wooldridge v. Draper*, xv. 470.

See ADMINISTRATION, 37.

d. APPEAL.

26. Where the plaintiff, in an appeal from a Justice, recovers as much in the Circuit Court as he did before the Justice, but afterwards remits a part, he is still entitled to his costs on the appeal. *Buckner v. Armour*, i. 534.

27. If, on an appeal to the Circuit Court from a Justice, the plaintiff recovers nothing, he shall pay the costs of both courts. (R. S. 1825, 228, § 14.) *Ashabramner v. Perkins*, ii. 188.

28. Where a plaintiff has recovered judgment before a Justice, and on appeal to the Circuit Court has judgment for a less sum, it is error to adjudge the whole costs against him. The statute only makes him liable for the costs of the appellate court. *Filley v. Talbott*, xviii. 416.

e. ATTACHMENT.

29. An officer having charge of property attached must be allowed a fair and just compensation for his services and expenses, the amount of which is to be determined by the court in the exercise of a sound discretion. *Hesse v. Kinn*, xiv. 395.

See ATTACHMENT, 90.

f. CHANCERY.

30. Under the statute relating to costs, (R. S. 1835, 130, § 20,) the courts of equity, except where a bill is dismissed, have a discretion in the allowance of costs, and it is questionable whether an appellate court has any control over the matter. *Shields v. Bogliolo*, vii. 134.

See CHANCERY, 96.

g. CONDEMNATION OF LAND TO PUBLIC USE.

31. Where a railroad company, after having commenced proceedings for the condemnation of land, dismisses the proceedings before judgment, the company shall pay the costs and expenses of the suit. *North Missouri R. R. Co. v. Reynal*, xxv. 534.

h. FERRY.

32. In an action for a penalty given by "an act regulating ferries," where one half the sum recovered went to the State and one half to the prosecutor, the prosecutor, under a rule, &c., became security for costs, and filed bond as such security—*Held*, that the court, upon a verdict against the plaintiff, could not enter up judgment for costs against him, he being responsible on his bond. *Eckert v. Head*, i. 593.

i. GUARDS AROUND JAIL.

33. Where guards are summoned for the safe keeping of a prisoner confined in jail, the County Court cannot disallow the costs for the reason that the jail was sufficient. The law vests the discretion of employing guards in certain officers, and their discretion cannot be questioned by another tribunal. *Berry v. St. Francois County*, ix. 356.

j. LIBEL AND SLANDER.

34. Where the plaintiff, in a suit for slander, fails to prove the words as charged, the court may, in allowing an amendment, require the plaintiff to pay all costs that have accrued since the commencement of the suit. *Street v. Bushnell*, xxiv. 328.

k. OFFICIAL BOND.

35. The statute relating to costs (R. S. 1835, 127, § 1,) embraces only those cases in which the name of the real plaintiff is not upon the record, as where an official bond is given to the State, and suit is instituted in the name of the State to the use of the party suing. It does not extend to cases commenced before a Justice. *McCurdy v. Brown*, viii. 549.

l. PARTITION.

36. Where, in a case of partition, some of the land is divided and allotted to those entitled thereto, but some of the land cannot be divided and is sold, the costs of all the proceedings, including those of the sale, must be borne equally by all the parties. *Cooper v. Garesche*, xxi. 151.

37. Where a partition sale is set aside on a motion which is contested by the purchaser, it is within the discretion of the court to tax the costs of the motion against him. *Neal v. Smith*, xxii. 349.

m. REPLEVIN.

38. The security in a replevin bond is not bound for the costs of the suit. (See R. S. 1835, 527, §§ 5, 8, 9.) *Morrow v. Shepherd*, ix. 213.

n. TENDER.

39. Under the statute, (R. S. 1845, 245, § 23,) where a tender is made and full payment offered before suit brought, the defendant is entitled to his costs without bringing the money into court or showing that he had always been ready to pay, and evidence of such a tender is admissible. *Klein v. Keyes*, xvii. 326.

O. TRIAL OF RIGHT OF PROPERTY.

40. Where, upon a trial of the right of property before a jury summoned by the sheriff, the claimant recovers less than half (in value) of the property claimed by him, he is liable for all the costs. (See R. S. 1845, 480, § 23.) *Taylor v. Forman*, xii. 547.

P. VAGRANTS.

41. Where a party, prosecuted as a vagrant, is discharged, judgment for costs may be given against the informer. *White v. Walker*, xxii. 433.

See APPEAL, 9, 70-72; . . . ARBITRATIONS AND REFERENCES, VII; . . . BREACHES OF THE PEACE, 13, 14; . . . CRIMINAL LAW, XII; . . . GARNISHMENT, VIII; . . . PRACTICE IN SUPREME COURT, 37; . . . USURY, 11.

 COUNTY.

- I. ORGANIZATION.
- II. SEAL.
- III. COUNTY BUILDINGS.
- IV. PARTY TO ACTION.
- V. CONTRACT.

 I. ORGANIZATION.

1. In the act organizing McDonald county, which provided for the immediate election of county officers, "to serve until the general election," (Acts 1848-9, 31, § 7,) the words "general election" refer to the next general election for officers throughout the State, in August, 1850, and not to the several elections of the same county officers in other counties of the State. *The State v. King*, xvii. 511. See LAWS, 13, 19, 34, 64; . . . QUO WARRANTO, 5.

 II. SEAL.

2. The commissioner provided for in § 2 of the act in relation to bridges, (R. S. 1825, 192,) may adopt any seal as his own, and it will be the seal of the county for that purpose. *St. Louis County v. Cleland*, iv. 84.

 III. COUNTY BUILDINGS.

3. The Justices of the County Court have the control of the county buildings, and have power, summarily, to expel intruders from them. But where a person

has had possession of a room in a public building, by consent or permission of the court, he should be notified, and have a reasonable time to quit, and if his effects therein are summarily expelled by order of the Justices, they are liable for the damages thence ensuing. *Sparks v. Purdy*, xi. 219.

4. An order of the County Court for the expulsion of such person, is not a judicial proceeding in such sense as to exempt the justices from liability for an improper or illegal order. *Ibid.*

5. Where commissioners are appointed by an act of the legislature, with authority to cause certain county buildings to be erected, whenever they shall raise, by the sale of lots, &c., funds which "may by them be deemed adequate" for the object proposed, they are the judges of the sufficiency of the fund, and will be deemed to have pursued the authority vested in them, although the amount should prove insufficient for the purpose. *Ruggles v. Washington County*, iii. 496.

6. In erecting county buildings the County Court must strictly pursue the provisions of the statute, (R. S. 1845, 286.) *Wolcott v. Lawrence County*, xxvi. 272.

IV. PARTY TO ACTION.

See CORPORATION, 37, 38.

V. CONTRACT.

7. An act of the legislature empowered certain persons "as commissioners" to purchase land for the use of the county of M., to be used as a seat of justice, to lay off said land into lots and sell said lots for ready money, or on a credit of not exceeding twelve months, and to apply the proceeds to the building of a jail, &c., (1 Ter. L. 581, § 4.) — *Held*, that the commissioners, if they promise to pay for the building of a jail before they have received the money for the lots sold, are personally bound, and the county is not liable. *McClenticks v. Bryant*, i. 598.

8. Public agents become personally responsible if they exceed their authority and use apt words to bind themselves. *Ibid.*

9. Describing themselves as "Commissioners, &c." in the contract does not prevent their being bound personally. *Ibid.*

10. But a contract made by commissioners in behalf of a county, where they have complied strictly with the act of legislature empowering them, (1 Ter. L. 563, § 4,) is binding on the county, and the commissioners are not personally liable thereon. *McDonold v. Franklin County*, ii. 217.

11. The county of St. Louis appointed a commissioner to act jointly with one to be appointed by the city, to contract for building a bridge on such plan as they should think best. The law authorizing this agency, (R. S. 1825, 192, § 2,) requiring the County Court first to decide on the plan and materials, and then to appoint a commissioner, &c., not having been pursued in this case, the appointment was held illegal, and the person appointed not the agent of the county. *St. Louis County v. Cleland*, iv. 84.

See CIRCUIT ATTORNEY, I; . . . ERROR, 23, 24.

COUNTY TREASURY.

- I. DISBURSEMENT.
- II. COUNTY WARRANT.
- III. TREASURER'S BOND.

I. DISBURSEMENT.

1. Where a County Treasurer owns a warrant drawn upon a particular fund, and applies the money belonging to that fund in payment of his own warrant, to the exclusion of others, it is a legal disbursement of the fund. *NAPTON, J., dis. Marshall v. Platte County*, xii. 88.

II. COUNTY WARRANT.

2. The statute of 1845, prescribing the form of county warrants (R. S. 1845, 311, §§ 4, 5,) is merely directory, and a departure from the form prescribed is no defense to an action on the warrant. *Young v. Camden County*, xix. 309.

III. TREASURER'S BOND.

3. A bond of a County Treasurer, executed to the State, instead of the county, as required by the statute, is good as a common law bond. *The State v. Thomas*, xvii. 503.

4. A petition which charges that the County Treasurer has received money "which he neglects and refuses to pay to the county," does not sufficiently assign a breach of his bond. There must be an averment that warrants have been drawn upon him by order of the County Court. *Ibid.*

See EVIDENCE, 2, 9 ; . . . INTEREST, 10 ; . . . LIMITATIONS, 27, 28.

◆ ◆ ◆

COURTS.

- I. TERMS OF.
- II. RULES OF.
- III. RECORDS.
- IV. COUNTY COURT.
- V. HANNIBAL COURT COMMON PLEAS.
- VI. ST. LOUIS LAND COURT.
- VII. LAW COMMISSIONER'S COURT.

I. TERMS OF.

1. It is competent for the legislature to change the times for holding the courts, and to continue all suits, process, sales and advertisements of sales, to

such subsequent terms of the courts as may be fixed by law. *Carson v. Walker*, xvi. 68.

2. It is no error for a court to hold a special term in one county, on a day fixed by law for the holding of court in another county in the same circuit. The statute relating thereto is merely directory, (R. S. 1845, § 37, § 54,) *Lewin v. Dille*, xvii. 64.

See CRIMINAL LAW, XV.

II. RULES OF.

3. The Circuit Court has an inherent right to make its own rules, but before such rules become obligatory, they ought to have a reasonable publicity. *Risher v. Thomas*, ii. 98.

4. Where the answer to the petition is improper, the rule of the St. Louis Circuit Court in relation to filing abstracts of the pleadings is inapplicable. *Engler v. Bate*, xix. 543.

III. RECORDS.

5. It is not necessary to the validity of records of court in this State, that they should be signed by the Judge. *Platte County v. Marshall*, x. 345.

6. In the authentication of a public record by the private seal of an officer, as provided for in the statute, (R. S. 1845, § 32, § 20,) the sealing must be by an impression upon wax or other tenacious substance. A scroll is not sufficient. *Gates v. The State*, xiii. 11.

See AMENDMENT, V.

IV. COUNTY COURT.

7. County Courts are authorized to hold adjourned terms, and all business done at such adjourned sessions is considered as done at the regular term. *Higgins v. Ransdall*, xiii. 205.

8. A final order of the County Court cannot be set aside at a subsequent term merely upon the ground of error. *Peake v. Redd*, xiv. 79.

9. But if the County Court order that a certain sum be paid to a party as a gratuity, it is not a judicial but an administrative act, and may be revoked at a subsequent term of the court. *The State v. Cooper County Court*, xvii. 507.

V. HANNIBAL COURT COMMON PLEAS.

10. Under the statute creating the Hannibal Court of Common Pleas (Acts 1844-5, 65,) all expenses incurred in the establishment of the court must be paid by the citizens within the corporate limits of the city of Hannibal, and a record book furnished by the clerk, for the use of the court, is a part of such expenses. *Bourne v. Marion County Court*, xv. 600.

VI. ST. LOUIS LAND COURT.

11. The act establishing the St. Louis Land Court, by providing that the Judge thereof should receive the same compensation as the Judge of the St. Louis Court of Common Pleas then received (Acts 1852-3, 90, § 5,) is construed to mean that he shall receive the same amount and from the same sources. *The State v. St. Louis County Court*, xx. 499.

See JURISDICTION, VII.

VII. LAW COMMISSIONER'S COURT.

12. The judgment required by § 8 of the statute, regulating the action of replevin, (R. S. 1845, 922,) in case the plaintiff fails to prosecute his suit with effect and without delay, is a final judgment and cannot be set aside by the Law Commissioner when once rendered by him. *Maids v. Watson*, xiii. 544.

13. Under the act of 1851, relating to the Law Commissioner's Court, (Acts 1850-1, 241,) the county is not required to furnish rooms for the transaction of the business of that court. *Watson v. St. Louis County*, xvi. 91.

See JURISDICTION, VIII.

COVENANT.

I. COVENANTS GENERALLY.

- a. CONSTRUCTION AND OPERATION.
- b. PERFORMANCE AND DISCHARGE.
- c. MUTUAL, DEPENDENT AND INDEPENDENT.
- d. ACTION.
 - aa. When Maintainable.
 - bb. Parties
 - cc. Pleading.
 - dd. Evidence.

II. PARTICULAR COVENANTS.

- a. SEIZIN.
- b. AGAINST INCUMBRANCES.
- c. WARRANTY.
- d. IMPLIED IN THE WORDS "GRANT, BARGAIN AND SELL."
- e. ASSIGNMENT OF.

I. COVENANTS GENERALLY.

- a. CONSTRUCTION AND OPERATION.

1. A covenant to do a thing requiring the exercise of skill and judgment, cannot be performed by an agent, and a parol agreement between the parties that an agent may do it, does not affect the original covenant. *Paul v. Edwards*, i. 30.

2. He who, in general terms, covenants to do a particular thing, shall be held to perform his covenant without the aid of the covenantee, unless such aid be indispensable to the performance of it. *Rector v. Purdy*, i. 186.

3. A., holding a bond executed by B., for certain lands, delivers it to C., who thereupon covenants to pay to A. a certain sum for the lands described in the bond, or to return him the bond when called for—*Held*, not to be a conditional covenant in favor of C., but that the condition is in favor of A., that, if the money is not paid he may reclaim his bond; and that C. is absolutely and unconditionally bound to pay the money, and could not discharge himself by returning the bond. *Ramsey v. Waltham*, i. 395.

4. Where M. covenanted to pay a specific sum for a slave at a specified time, or to pay a certain sum for the hire of the slave, and to return her to T.—*Held*, that M. was liable on the covenant to T. for the value of the slave, although the slave died before the time limited for the payment, or the return, if it was found that her death was occasioned by cruel and unusual treatment on the part of M. *Mann v. Trabue*, i. 709.

5. In an action on this covenant, the defendant will not be permitted to read in evidence the record of his trial and acquittal on a charge of feloniously killing said slave. *Ibid*.

6. The terms used in a covenant are to be construed according to their obvious meaning, and as generally understood in the community, and not according to their usage among a particular class of men. *Pavey v. Burch*, iii. 447.

7. Where parties mutually covenant together, the one to convey and the other to do certain acts as the consideration for such conveyance, the failure of either to perform his part of the covenant, gives a right of action to the other, although such failure is a good cause of forfeiture. The forfeiture may be waived. *Lucas v. Clemens*, vii. 367.

b. PERFORMANCE AND DISCHARGE.

8. Where the performance of a covenant to do certain work is prevented by the interference of the covenantee, the covenantor is discharged from the obligations of his covenant. *Jarrell v. Farris*, vi. 159.

9. Thus, where C. covenanted to deliver certain saw logs to J. & D., and was subsequently assaulted and killed by D., before any breach of the covenant—*Held*, that the covenant was released, and that a suit thereon could not be maintained against C.'s administrator by J. & D., or either of them, a release by one covenantee being a release as to all. *Ibid*.

10. But it is otherwise as to covenants to pay money or transfer lands or other property. *Per* NAPTON, J. *Ibid*.

c. MUTUAL, DEPENDENT AND INDEPENDENT.

11. H. covenanted with L. to execute a piece of work in an agreed time and manner, L. agreeing to pay for it in property at a stipulated price, the property to be selected by H.—*Held*, that these are mutual and dependent agreements, and that L. may show his readiness to pay in the manner agreed. *Labeaume v. Hill*, i. 42.

12. Where covenants are mutual and independent, either party may recover damages from the other for an injury which he may have sustained by non-performance. *Cook v. Johnson*, iii. 239.

See CONTRACT, V.

d. ACTION.

aa. *When Maintainable.*

13. C. covenanted with P. to erect a house for him at an agreed price to be paid on the completion of the work. After a considerable portion of it was done, P. interfered and stopped its further progress—*Held*, that C. could not recover for the work done in an action of *assumpsit*, but must sue on the covenant, and allege the excuse for its non-performance. *Clendennen v. Paulsel*, iii. 230.

14. An action of covenant cannot be sustained on a covenant modified by a subsequent parol agreement. *M'GIRK, J., dis. Raymond v. Fisher*, vi. 29.

15. An action of covenant will not lie in this State, upon an instrument executed in another State, and which by the law of such State is regarded as sealed, when by the law of this State such instrument is not also held as sealed. *Broadhead v. Noyes*, ix. 55.

See ADMINISTRATION, 17.

bb. *Parties.*

16. D. sold to R. a boat, and R., as a part of the transaction, agreed, under seal, to pay the employees on the boat the sum of \$600.—*Held*, in an action in favor of one of the employees against R., that a recovery could be had only in the name of the party with whom the covenant was made; but *Per SCOTT, J.*, it would be otherwise on a simple contract, all the employees joining in the suit. *Robbins v. Ayres*, x. 538. *Corl v. Riggs*, xii. 430.

17. The only covenant implied in the words "grant, bargain and sell," which runs with the land, is the covenant for further assurance. The word "assigns," as used in the statute, (R. S. 1845, 221, § 14,) is limited to that covenant. *Collier v. Gamble*, x. 467.

18. An action cannot be sustained in the name of an assignee for the breach of the other covenants. *Ibid.*

19. And the statutory covenant being not simply a covenant of seizin, but of seizin of an indefeasible estate in fee simple, the measure of damages is not in all cases the purchase money with interest. Where the vendor was actually seized, but of a defeasible estate, the damages should be merely nominal, until the estate has been actually defeated. *Ibid. Reese v. Smith*, xii. 344. *Bircher v. Watkins*, xiii. 521. *Mosely v. Hunter*, xv. 322.

20. Where a broken covenant of seizin is assigned, the assignee must, under the new code, sue in his own name. *Van Doren v. Relfe*, xx. 455.

cc. *Pleading.*

21. In an action of covenant, it must appear in the declaration with whom the covenant was made. So, too, the performance or readiness to perform, or the

excuse for the non-performance of a condition precedent, must be shown at the place and within the time specified; and on a covenant to partners, the breach should be, the failure to perform to them or either of them; and error on these points is not cured by a judgment by default. *Tate v. Barcroft*, i. 163. *Keatty v. McLaugherty*, iv. 221.

22. In an action of covenant on a bond, by which the obligor bound himself to "make, execute, and deliver to the obligee, a good and sufficient warranty deed" for certain lots of ground, upon his paying the purchase money, it is not necessary for the plaintiff to aver that he prepared and tendered to the obligor a deed, ready for the obligor to execute, at plaintiff's expense, or that before suit brought, plaintiff demanded of the obligor a conveyance. *Rector v. Purdy*, i. 186.

23. Where A. covenants with B. to cause C., or his legal representatives to make a particular description of title to certain lands, a plea that C. made the title to D., and A. offered a deed from D. to B., answering the words of the covenant, is good. *Davis v. Burns*, i. 264.

24. In an action of covenant, where the declaration contains two counts, differing in the description of the writing sued on, and oyer being craved of the writing in the declaration mentioned, one instrument only is set out, which varies from each count—*Held*, that, on general demurrer, the plaintiff shall recover on the second count, inasmuch as that count sets forth a good cause of action, and it does not appear that the instrument of which oyer was given is the same therein described. *Turley v. Barcroft*, i. 502.

25. Where two covenants are independent of, and have no reference to, each other, the averment of performance of one of them, in a suit upon the other, will be considered immaterial, and a plea traversing the performance will be bad on general demurrer. *Simonds v. Beauchamp*, i. 589.

26. Where A. covenants to convey land to B., by general warranty deed on a day certain, and B. at the same time executes his obligation to pay A. the purchase money on the day named for the making of the deed, and the instruments do not refer to each other, the covenants are independent, and failure by B. to pay the money cannot be pleaded in bar to an action on the covenant.—*Ibid*.

27. To an action for breach of a covenant for not making a deed on a day certain, the defendant pleaded the fact that he attended at the time and place agreed on, and then and there offered to execute the deed, but that the plaintiff waived the same, and excused the defendant from so doing—*Held*, that the plea was good, although it failed to answer other breaches assigned in the declaration, these being answered by other pleas. *TOMPKINS, J., dis. Colgan v. Sharp*, iv. 263.

28. A plea to an action of covenant on a lease, which alleges a surrender and acceptance of the unexpired term, should allege that the plaintiff accepted the same in discharge of the covenant, as nothing will discharge a covenant but a performance of it, or a release under seal. *Thomas v. Cox*, vi. 506.

29. Where a party covenants to convey land upon the performance of a particular act, as the payment of money, it is not necessary in declaring on such covenant to allege a demand for a deed. *Pye v. Rutter*, vii. 548.

See ASSMPSIT, 41.

dd, *Evidence.*

30. In an action upon a covenant to convey land as soon as a patent could be obtained from the United States, the land having been located by the covenantee by virtue of a New Madrid certificate, the defendant pleaded that he could not procure a patent—*Held*, that the defendant could not show, in support of his plea, a patent in the name of L., and a certificate of survey of the tract in controversy. *Green v. McGirk*, i. 498.

31. Evidence of a particular custom or usage is not admissible to control the provisions of an express covenant. *Pavey v. Burch*, iii. 447.

32. In an action of covenant for not making a deed on a day certain, the defendant pleaded an offer to make the deed, and that the plaintiff refused to accept it. On replication denying the tender, it was *held*, that proof that defendant was ready to make and plaintiff to receive the deed, but that both agreed to waive the making at that time, did not sustain the plea. *Sharp v. Colgan*, iv. 29.

33. Evidence of an erasure, or alteration of an instrument of writing, is admissible under the plea of *non est factum*, without affidavit. *Whitmer v. Frye*, x. 348.

See LIMITATIONS, 5, 29, 30.

II. PARTICULAR COVENANTS.

a. SEIZIN.

34. In an action on a covenant of seizin, proof of a grant by the Spanish Government of the land in question, and a survey and location thereof, will not sustain a plea of seizin, where the claim to the land was rejected by the Board of Commissioners of Private Land Claims. *Tapley v. Labeaume*, i. 550.

35. The criterion of damages in an action on a covenant of seizin is the purchase money with interest. *Ibid.*

36. Where the grantor in a deed containing a covenant of seizin has no title to the land, the covenant is broken the instant it is made. *Ibid.*

37. Where a covenant of seizin is broken, and the covenantor dies before the defect of title is discovered, and his personal representative procures a good title in himself, and tenders a deed to the covenantee, a court of equity will compel the purchaser to accept such conveyance, and enjoin a judgment at law for the purchase money and interest, obtained on account of the breach of such covenant. *Scott, J., dis. Reese v. Smith*, xii. 344.

38. The covenant of seizin in a deed is an assurance to the purchaser that the grantor has the estate, both in quantity and quality, which he purports to convey. The covenant in such case is broken if the grantor does not own all the land embodied in his deed. *Pecare v. Chouteau*, xiii. 527.

39. In order to establish a right to recover for a breach of the covenant of seizin, it is not necessary to show an eviction; it is sufficient if some damage resulting from an outstanding paramount title be shown. If damages are sought to be recovered for the extinguishment of this title, it devolves upon the plain-

tiff to show the reasonableness of the price paid; and this is to be determined by the value of the land at the time of the extinguishment of the paramount title, and not by its value at the date of the previous transfers. *Per* LEONARD, J. *Dickson v. Desire*, xxiii. 151.

See ADMINISTRATION, 107.

b. AGAINST INCUMBRANCES.

40. In an action for a breach of covenant against incumbrances, the plaintiff may give evidence of any facts down to the time of the trial, to show the extent of his injury. *Mosely v. Hunter*, xv. 322.

41. A general covenant against incumbrances is broken by the existence of an incumbrance at the making of the deed. The breach must set out the particular incumbrance relied on. *Shelton v. Pease*, x. 473.

See ADMINISTRATION, 107.

c. WARRANTY.

42. The record of proceedings in forcible entry and detainer, by which the plaintiff was evicted, is admissible in an action on a covenant of warranty, to show the eviction, but does not establish the fact that such eviction was by paramount title. *Fields v. Hunter*, viii. 128.

43. A. conveyed certain premises to B. with warranty; B. conveyed them to C., and C. agreed to convey them to D.; D. took and continued in possession thereof, until evicted by persons claiming under a paramount title; after this eviction, D. obtained a decree against C. for a specific performance, in a suit instituted previous to the eviction—*Held*, by SCOTT, J., that inasmuch as there was no interest or estate in C. upon which the decree could take effect, that it did not operate an assignment to D. of the covenant of warranty in A.'s deed, so as to enable D. to sue thereon. *Vancourt v. Moore*, xxvi. 92.

44. And previous to such decree, C. obtained a judgment against A. on his covenant of warranty, which was paid by A., C. indemnifying him against liability to any other person on account of the covenants in his deed—*Held*, by RICHARDSON, J., that since it appeared that, at the time of the eviction, D. had not paid the purchase money, and consequently had not a complete equitable title as against C.; that the judgment in favor of C. against A. was a bar to a suit by D. against A., on the latter's covenant of warranty; that the decree would not, in such case, relate back to a point of time anterior to the eviction, although, if there had been no recovery by C. against A., the decree would so relate back, and operate as an assignment of the covenant. *Ibid*.

45. And *Held*, by NAPTON, J., that A. having notice of the equitable rights of D., and having taken a bond of indemnity from C., the decree relates back to the time of the sale by C. to D. *Ibid*.

d. IMPLIED IN THE WORDS "GRANT, BARGAIN AND SELL."

46. A deed containing the words "grant, bargain, sell and enfeof," is operative as a deed of feoffment; and *livery of seizin* is not necessary to give it that

effect. The want of livery of seizin is supplied by recording the deed in the Recorder's office. *Perry v. Price*, i. 553.

47. Where a statute provided that "all deeds whereby an estate of inheritance, in fee simple, shall be limited to the grantor and his heirs, the words 'grant, bargain and sell' shall be adjudged an express covenant to the grantee, his heirs and assigns," (Gey. Dig. 127, § 1,) it was held, that though the provision, as so written, had no meaning, it was not competent for the court to give it a meaning by assuming the word *grantor* to have been inserted by mistake, and inserting in lieu thereof the word *grantee*. *Carter v. Soulard*, i. 576.

48. The covenants implied by the words "grant, bargain and sell," in a deed of conveyance under the statute, (R. S. 1845, 221, § 14,) are separate and independent of each other. *Alexander v. Schreiber*, x. 460.

49. Where a deed of conveyance, containing the words "grant, bargain and sell," recites a mortgage, existing at the time on the property conveyed, and contains a special covenant "that the grantor will forever warrant and defend the premises conveyed against all persons lawfully claiming the same, in law or equity, and against all titles, liens and incumbrances whatever, and particularly against the mortgage above described," the general covenant implied by the words "grant, bargain and sell," is restrained by the special covenant. *Shelton v. Pease*, x. 473.

50. Such special covenant is not a covenant to pay the mortgage debt. *Ibid*.

51. A mere payment of money by the purchaser to buy in an incumbrance, is no breach of this covenant, nor of a covenant of general warranty, or of quiet enjoyment. There must be an eviction, or something equivalent thereto, to constitute a breach of these covenants. *Ibid*.

52. In a conveyance of land under the statute of Illinois, the words "grant, bargain and sell," express covenants that the grantor is seized of an indefeasible estate in fee simple, free from incumbrances done or suffered by the grantor, as also for quiet enjoyment against the grantor, his heirs and assigns. *Mosely v. Hunter*, xv. 322.

53. The statutory covenant of seizin, implied in the words "grant, bargain and sell," is a covenant running with the land; and where possession accompanies the conveyance, it will enure to the benefit of the subsequent transferee in possession at the time of the substantial breach, by the assertion of a paramount title; and that, too, although an intermediate conveyance may have been a sheriff's deed. *Dickson v. Desire*, xxiii. 151. *Chambers v. Smith*, xxiii. 174.

54. The statutory covenant for further assurance implied in the words "grant, bargain and sell," embraces such incumbrances only as the vendor has control of, and not an outstanding mortgage created by his grantor. *Armstrong v. Darby*, xxvi. 517.

See SUPRA, 17-19; . . . ADMINISTRATION, 106.

e. ASSIGNMENT OF.

55. A. conveyed certain premises to B., by a deed containing the covenants implied in the words "grant, bargain and sell," which were at the time subject to a mortgage incumbrance. B. conveyed the same premises to C.—Held, that

C. thereby acquired all the rights of B. in the covenants contained in A.'s deed to him, together with a right to sue upon them in his (B.'s) name, and that he was not affected by any verbal understanding between A. and B. as to the incumbrance, unless the fact of its existence was brought to his knowledge at or before the time of his purchase. *Alexander v. Schreiber*, xiii. 271.

See DAMAGES, 18-28;....DEMAND, 10;....ESTOPPEL, VII;....JURISDICTION, 52;....TENDER, 5.

CRIMINAL LAW.

I. CRIMES.

- a. ADULTERY AND LEWDNESS.
- b. ARSON.
- c. ASSAULT.
 - aa. Assault to commit Manslaughter.
 - bb. Assault to kill.
- d. BAWDY HOUSE.
- e. BURGLARY.
- f. COUNTERFEITING.
- g. CRUELTY TO ANIMALS.
- h. CRUELTY TO SLAVE.
- i. DESTRUCTION OF A DWELLING HOUSE.
- k. DISCLOSURES BY GRAND JUROR.
- l. DISTURBANCE OF A NEIGHBORHOOD OR FAMILY.
- m. DISTURBANCE OF PUBLIC WORSHIP.
- n. DUELLING.
- o. EMBEZZLEMENT.
- p. ESCAPE.
- q. FALSE PRETENSES.
- r. FELONY, DEFINITION OF.
- s. FRAUDULENT CONVEYANCE.
- t. FORGERY.
- u. GAMING.
 - aa. Setting up or Permitting Gambling Device.
 - bb. Betting
 - cc. Betting on Election.
- v. GUARDIAN'S CARNAL KNOWLEDGE OF WARD.
- w. KILLING AND MAIMING CATTLE.
- x. LARCENY.
- y. MALPRACTICE.
- z. MAYHEM.
- (a.) MURDER.
 - aa. Indictment.
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 - cc. Malice.
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 - ee. Insanity.
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 - gg. Practice—Questions for Court.

- (b.) OBSCENITY.
- (c.) PERJURY.
- (d.) RAPE.
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- b. CAPTION AND CONCLUSION.
- c. NAME OF DEFENDANT.
- d. JOINDER OF DEFENDANTS.
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- f. TIME WHEN OFFENSE WAS COMMITTED.
- g. INDORSEMENT.
- h. SIGNATURE OF CIRCUIT ATTORNEY.
- i. JOINDER OF COUNTS.
- j. WHAT ACTS ARE OR ARE NOT INDICTABLE.
- k. MOTION TO QUASH.
- l. NEGATIVE EXCEPTIONS.
- m. PLEA IN ABATEMENT.
- n. FOR DIFFERENT OFFENSES—See THEIR TITLES.

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- b. JURISDICTION.
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V. CHANGE OF VENUE.

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VI. GRAND JURY.

VII. PETIT JURY.

- a. TRIAL BY.
- b. VENIRE—RIGHTS OF DEFENDANT.
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 - aa. Generally.
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XV. COURTS—TERMS OF.

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XVII. BILL OF EXCEPTIONS.

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XX. PRACTICE IN SUPREME COURT.

I. CRIMES.

a. ADULTERY AND LEWDNESS.

1. An indictment must state all the circumstances which enter into the definition of the offense in the statute, so as to bring the defendant precisely within it; and a defect in this particular is not cured by the general conclusion, "contrary to the form of the statute." (See R. S. 1835, 206, § 8.) *The State v. Helm*, vi. 263.

2. A count, however, which charges the offense in the precise words of the statute is sufficient. *Ibid*.

3. But it is not sufficient to charge the defendant generally, in the words of the statute, with being guilty of "open, gross lewdness and lascivious behavior," by then and there publicly cohabiting with one F., &c. The charge should be thus: "by publicly, lewdly and lasciviously abiding and cohabiting with, &c." *Dameron v. The State*, viii. 494.

4. An indictment under that statute which charges the offense as committed on a certain day, is sufficient, without a *continuando*, although evidence of a single act of criminal intercourse might not be sufficient to establish the offense alleged. *Hinson v. The State*, vii. 244.

5. An indictment of a married man, for lewdly and lasciviously abiding and cohabiting with a female, must state that the parties lewdly and lasciviously abided and cohabited "with each other," in the words of the statute. (R. S. 1845, 400, § 8.) *The State v. Byron*, xx. 210.

6. And an indictment against a man and woman, which charges that they were "guilty of open, gross lewdness and lascivious behavior, by publicly, lewdly and lasciviously abiding and cohabiting with each other," &c., in the words of the statute is good, although it does not state whether they were married or unmarried. *The State v. Bess*, xx. 419. *The State v. Wilhight*, xx. 422.

7. The declarations and admissions of the defendant are competent evidence to prove that he was a married man at the time of the alleged adultery. *The State v. McDonald*, xxv. 176.

b. ARSON.

8. In an indictment under the statute, for setting fire to a dwelling-house in which there was at the time a human being, (R. S. 1845, 354, § 1,) it is not necessary to allege the name of the person. *The State v. Aguila*, xiv. 130.

9. An indictment charging that the defendant "did set (omitting the word "fire,") to, and the same house then and there, by the spreading of such fire, did feloniously, wilfully and maliciously burn and consume," is sufficient. *Polsten v. The State*, xiv. 463.

c. ASSAULT.

aa. Assault to commit Manslaughter.

10. An assault with intent to commit manslaughter is an indictable offense under the statute, (R. S. 1835, 171, § 34,) and is sufficiently described in the indictment as an assault with intent to kill. *The State v. Johnson*, iv. 618.

11. But an assault with intent to wound is not indictable. *Ibid*.

12. And where an indictment framed under this statute charges that the assault was made with a knife, and the wound inflicted therewith was termed a stab—*Held*, that the word stab was used in its popular and not in its technical sense. *Ruby v. The State*, vii. 206.

bb. *Assault to Kill.*

13. An indictment under the statute, (R. S. 1835, 171, § 31,) which charges that the defendant "feloniously, unlawfully and with malice aforethought, did shoot," &c., is bad. It should have charged in the words of the statute, that the offense was committed "on purpose and of his malice aforethought." In such an indictment it is sufficient to charge the intent in the words of the statute, without alleging that the act was done "with intent feloniously to kill," &c. *The State v. Comfort*, v. 357.

14. But the indictment must aver that the assault was with a deadly weapon. *The State v. Jordan*, xix. 212.

15. An indictment under the statute (R. S. 1845, 350, § 34,) for an assault upon one J. C., with intent to kill, charging that the defendant, "with a certain gun, then and there loaded with gunpowder and divers leaden balls, which said gun he, the defendant, then and there had and held in his hands, to, against and upon the said J. C., and then and there did unlawfully, feloniously, on purpose, and of his malice aforethought, the said gun did cock, raise and present, with the intent then and there unlawfully, feloniously, and of his malice aforethought, the said J. C. to shoot and kill; and that the said defendant would have executed his said purpose and intent had he not been prevented and intercepted from so doing, contrary," &c., is sufficient. *The State v. Greenhalgh*, xxiv. 373.

16. And an indictment founded on this statute, charging an assault with a loaded gun, with intent to kill, is not rendered defective by an omission to state the manner of the assault or the mode in which the gun was used or attempted to be used. *The State v. Chandler*, xxiv. 371.

17. So an indictment under the statute, (R. S. 1855, 565, § 35,) charging that the defendant feloniously assaulted C. H. with a loaded pistol, and then and there with said pistol feloniously, &c., did shoot said C. H., with the intent to kill him, is sufficient. *The State v. Vaughn*, xxvi. 29.

18. A. was indicted for an assault upon B., with intent to kill. A. had previously written an obscene letter about his own wife, the mother-in-law of B., and which provoked the latter to make the first assault—*Held*, that this letter was inadmissible as evidence against A. *The State v. Williamson*, xvi. 394.

19. Where A. is charged with an assault upon B. with intent to kill, remarks or threats affecting A., made by B. to a third party before the assault, are not admissible in evidence in A.'s behalf; especially when it does not appear at what time they were communicated to him. *The State v. Jackson*, xvii. 544.

20. Declarations of B., some months after the assault, in palliation of A.'s guilt, are inadmissible. *Ibid.*

21. Evidence of B.'s general bad and dangerous character is inadmissible, he being unoffending when assaulted. *Ibid.*

22. Evidence of threats made by B. is inadmissible, if time enough had elapsed for the blood to cool. *Ibid.*

23. On a charge of assault with intent to kill, an instruction which so defines the crime as to exclude all consideration whether the assault was committed under circumstances of provocation or in self-defense, is erroneous. *The State v. Williamson*, xvi. 394.

24. There may be an assault with intent to kill, although there is no striking or wounding; and in such case it would be error to instruct the jury that if the defendant might have struck and did not, they should find for the defendant. *The State v. McClure*, xxv. 338.

25. If one having a gun in his hands raises it to a level and directs it towards, but not directly at, another, and threatens to kill him if he advances in a certain direction, it will constitute an assault; it is not necessary that the gun should be raised to the shoulder. *The State v. Epperson*, xxvii. 255.

d. BAWDY HOUSE.

26. The wife, as well as the husband, may be indicted for keeping a bawdy house, and they may be indicted jointly. *The State v. Bentz*, xi. 27. See *Queen v. Williams*, 1 *Salk.*, 384.

27. Upon the trial of an indictment for keeping a bawdy house so as to become a common nuisance, it is competent to prove the character of the women who live and are lodged therein, and of the men who frequent it, and their behavior while there, and also the effect of the establishment upon the peace and good order of the neighborhood. *Clementine v. The State*, xiv. 112.

28. And the refusal of witnesses who have frequented the house to answer questions in reference to the conduct of the inmates and visitors while there, upon the ground that they would thereby degrade themselves, may be taken into consideration by the jury in making up their verdict. *Ibid.*

29. But it seems that a house cannot be proved to be a brothel by common reputation. *Loehner v. Home Mutual Ins. Co.*, xvii. 247.

30. It is not necessary that the name of the prosecutor should be indorsed on an indictment for keeping a bawdy house. *The State v. Bean*, xxi. 267.

e. BURGLARY.

31. An indictment for house-breaking, under the statute, (R. S. 1845, 356. § 16,) must specify the manner of breaking, so as to show, on the face of the indictment, the exact offense intended to be charged, and to exclude other offenses of house-breaking described by the statute. *Conner v. The State*, xiv. 561.

See *INFRA*, 232.

f. COUNTERFEITING.

32. An indictment for counterfeiting current coin should charge the offense to have been committed "with intent to defraud," as the intent constitutes a part of the offense. *Mattison v. The State*, iii. 421.

33. The indictment charged the counterfeit money to be in imitation of the "silver coin of the State of Missouri" called a "Mexican dollar"—*Held*, that the words "of the State of Missouri" were descriptive of a material part of the offense, and could not be rejected as surplusage, and that they were repugnant to the allegation that the coin counterfeited was a "Mexican dollar," and that the indictment was therefore bad. *The State v. Shoemaker*, vii. 177.

34. Under the statute of 1835 (R. S. 1835, 187, § 21,) an indictment for passing counterfeit bank notes, may describe them as "forged and counterfeited," these words being synonymous. *Hobbs v. The State*, ix. 845.

35. And under § 8 of the same statute, (p. 185,) it is not necessary to aver that the bank had any legal existence. *Ibid*.

36. The statute which provides that "every person who shall counterfeit, &c., coin at the time current within the State," (R. S. 1835, 184, § 7,) has reference to coin current in the State at the time the counterfeit is made, and not to the time when it is passed. *The State v. Shoemaker*, vii. 177.

37. If one passes counterfeit money, and another in any way aids and abets its passage, knowing it to be counterfeit, an intent to defraud may be inferred, and both are guilty. *The State v. Mix*, xv. 153.

38. After having shown that the defendant had passed a bank note which was counterfeit, as charged in the indictment, evidence is admissible to show that he had also passed other counterfeit bank notes of a similar kind to other persons at different times, before and subsequent to the indictment, in order to establish guilty knowledge. *Ibid*.

39. On an indictment for forgery in the second degree, (uttering forged writing or counterfeit coin,) under the statute, (R. S. 1835, 187, § 21,) the jury found the defendant guilty as charged in the indictment—*Held*, that it was not necessary for the jury to specify in their verdict the degree of the offense of which they found the defendant guilty, since the defendant could not be convicted of forgery in a less degree than that alleged in the indictment. *The State v. Shoemaker*, vii. 177.

See *INFRA*, 64, 66.

g. CRUELTY TO ANIMALS.

40. An indictment under the statute prohibiting cruelty to animals, (R. S. 1845, 406, § 38,) charging that the defendant tied brush or boards to the tail of a horse, unaccompanied with averments declaring the effect of the act, is insufficient. *The State v. Pugh*, xv. 509.

h. CRUELTY TO SLAVE.

41. In an indictment under the statute, (R. S. 1845, 406, § 39,) for inhumanly beating a slave, it is not necessary to set forth the name of the owner of the slave. *Grove v. The State*, x. 232.

i. DESTRUCTION OF A DWELLING HOUSE.

42. The unlawful destruction of a dwelling house, in the peaceable possession of another, is an offense indictable at common law, and is not embraced in the

act of January, 1831, making assault, battery, &c., not indictable. (2 Ter. L., 271, § 1.) *The State v. Wilson*, iii. 125. *The State v. Morris*, iii. 127.

K. DISCLOSURES BY GRAND JUROR.

43. A disclosure by a grand juror of the names of witnesses who testified before the jury, and the subject matter about which they testified, is not an offense within the provisions of the statute, (R. S. 1835, 480, § 17.) *The State v. Brewer*, viii. 373.

L. DISTURBANCE OF A NEIGHBORHOOD OR FAMILY.

44. The word "such," in the statute, (R. S. 1835, 204, § 15,) rejected as a clerical inaccuracy. *The State v. Beasley*, v. 91.

45. The name of the prosecutor need not be indorsed on an indictment under the statute relating to disturbing the peace of a family or neighborhood in the night time, (R. S. 1835, 204, § 15,) since such misdemeanor is not a "trespass against the person or property of another." (See R. S. 1835, 481, § 22.) *The State v. McCourtney*, vi. 649, EXPLAINED. *The State v. Moles*, ix. 685.

46. In an indictment for disturbing the peace in the night time, under the statute, (R. S. 1845, 396, § 15,) a married woman, who has been abandoned by her husband for five years, may properly be charged as the head of the family whose peace was disturbed. *The State v. Slater*, xxii. 464.

M. DISTURBANCE OF PUBLIC WORSHIP.

47. An indictment under the statute (R. S. 1845, 404, § 28,) which charges that the defendant did "wilfully and contemptuously disturb a congregation of people met for religious worship," &c., is bad, since "congration" is not an abbreviation in common use, or a word known to the language. *The State v. Mitchell*, xxv. 420.

48. And an indictment under this statute charging that the defendant "did disturb a congregation of people then and there met for religious worship, by then and there making an assault upon one H., so near to the place of worship of said congregation of people as to disturb the order of the meeting, contrary," &c., is insufficient. *The State v. Bankhead*, xxv. 558.

49. An indictment under the statute, (R. S. 1855, 630, § 30,) charging that the defendants unlawfully did disturb a congregation and assembly of people met for religious worship, by wilfully behaving in a rude and indecent manner, and using profane discourse within the place of worship of said congregation, is bad; the offense should be charged to have been done wilfully, maliciously, or contemptuously. *The State v. Hopper*, xxvii. 599.

N. DUELLING.

50. In an indictment for bearing a challenge to fight a duel, it must appear from the evidence that the offense was committed within the jurisdiction of the court. *Gordon v. The State*, iv. 375.

O. EMBEZZLEMENT.

51. An indictment charging that the defendant, "an agent of a private company," embezzled certain goods entrusted to him as such agent, is bad, under either § 40 or § 42 of the statute. (R. S. 1835, 179.) *Hamel v. The State*, v. 260.

52. An indictment against a ticket agent of a railroad, founded on the statute, (R. S. 1855, 430, § 37,) need not allege a neglect or refusal on the part of the defendant to pay over on demand the moneys, &c., alleged to have been converted. *The State v. Porter*, xxvi. 201.

53. Under such indictment, it is competent for the prosecution to show the course of business pursued by the defendant and required by the rules of the company, by introducing in evidence duplicate blank returns used by the ticket agents of the company; the prosecution is not bound in such case to resort to the blank returns actually filled up and transmitted by the defendant, as agent, to the treasurer of the company. *Ibid.*

54. And it is not necessary that the prosecution should prove, by direct and positive evidence, that the conversion charged is without the consent of a railroad corporation, the alleged master or employer. *Ibid.*

55. The words "belonging to any other person," in the statute, (R. S. 1855, 579, § 39,) mean any other person than the officer, servant, &c., charged with the embezzlement. *Ibid.*

See *INFRA*, 233.

P. ESCAPE.

56. In an indictment under the statute (R. S. 1825, 304, § 70,) for suffering an escape, the warrant of commitment therein set out need not describe the offense charged against the party who had escaped with that certainty which is required in an indictment. *Lilly v. The State*, iii. 10.

Q. FALSE PRETENSES.

57. Under the statute relating to the obtaining of moneys, &c., by means of false pretenses, (1 Ter. L. 216, § 29,) it was *held*, that the word "effects" in the statute embraced bills of exchange, the obtaining of which by false pretenses is an indictable offense, and that the indictment is well laid which charges that the defendant obtained bills by pretending he had slaves, which he sold for said bills, when in fact he had no slaves. *The State v. Newell*, i. 248.

58. It is not sufficient for an indictment to charge the obtaining of money "by color of a false pretense." The word "color," used in the statute, (R. S. 1845, 363, § 49,) applies to the words "false token or writing," and not to the clause following them. *The State v. Chunn*, xix. 233.

59. Where A., claiming to be the owner of a slave, sells her with warranty of title, this is not such a false pretense as is embraced in the statute. (R. S. 1845, 363, § 49.) *Ibid.*

I. FELONY—DEFINITION OF.

60. A felony, under the statute, (R. S. 1835, 216, § 36,) is an offense for which the party, on conviction thereof, may be imprisoned in the penitentiary, and not

simply where he must be so imprisoned. *Johnston v. The State*, vii. 183. *Ingram v. The State*, vii. 293.

61. And an offense punishable otherwise than by death, or imprisonment in the penitentiary, is not a felony within the meaning of this statute. *Nathan v. The State*, viii. 631.

62. An offense which is made felony by the statute, whether it were a felony at common law or not, must be charged to have been committed feloniously. *The State v. Murdock*, ix. 730.

S. FRAUDULENT CONVEYANCE.

63. An indictment under the statute, (R. S. 1845, 364, § 54,) for fraudulently mortgaging premises previously conveyed, must allege the time and place of committing the offense. *The State v. Welker*, xiv. 398.

T. FORGERY.

64. A bank note in these words, "The President, Directors, and Company of, &c., will pay, &c.," signed by the President and Cashier, is properly described, in an indictment for forgery, as a promissory note. *Hobbs v. The State*, ix. 845.

65. A county warrant is such an instrument or writing as may be forged, within the meaning of the statute. (R. S. 1845, 371, § 16.) *The State v. Fenly*, xviii. 445.

66. And where a party is charged with altering or forging a county warrant, an indictment is sufficient which alleges that he falsely altered and forged the warrant, &c., intending to defraud, &c., setting forth the warrant in *hæc verba*, without alleging, in the words of the statute, that it was an "instrument or writing, being or purporting to be the act of another," &c., &c. *Scott, J., dis. Ibid.*

See SUPRA, 32-39.

U. GAMING.

aa. *Setting up or Permitting Gambling Device.*

67. An indictment under the statute, (R. S. 1835, 208, § 17,) is not vitiated by an omission of the words "for money or property," in describing the device that was permitted to be set up; provided they are used in describing the games that were to be played on such device. *The State v. Ellis*, iv. 474.

68. Charging the offense in the alternative, following the words of the statute is not fatal when the descriptive words in the statute are synonymous. *Ibid.*

69. It is unnecessary to allege by whose permission the betting, gambling, &c., was done, the proprietor of the house where the device was kept being responsible for the use made of it. *Ibid.*

70. If the offense charged is described in the words of the statute, it is sufficient. *The State v. Mitchell*, vi. 147.

71. An indictment under the statute, (R. S. 1845, 401, § 15,) for keeping a gaming table, charging that the defendant "did keep a certain gambling device, &c., called a faro-bank, and did then and there induce idle persons to play at

said gambling device for money," is not double; the acts alleged constitute but one offense. *The State v. Ames*, x. 743.

72. And in an indictment under this statute for enticing and permitting persons to play upon a gambling device kept by the defendant, it is not necessary to allege that money or property was bet, won or lost. An indictment which follows the language of the statute is sufficient. *The State v. Fulton*, xix. 680.

73. So an indictment which charges the defendant with permitting a "gambling device," instead of a "gaming device," is sufficient. *The State v. Nelson*, xix. 393.

74. And an indictment which charges the defendant with permitting a gaming device to be "set up and used," is not bad for duplicity. *The State v. Fletcher*, xviii. 425.

75. The game called "loto" is a "gambling device," within the meaning of the statute, (R. S. 1825, 310, § 89,) but in order to constitute the offense described in that section, money or property must have been staked and won or lost upon the results of the games of chance played. *Lowry v. The State*, i. 722.

76. So permitting cards to be used for gaming purposes is an offense under this statute. *The State v. Purdom*, iii. 114. *Eubanks v. The State*, v. 450.

77. And are a gambling device within the meaning of the statute. (R. S. 1845, 401, § 15.) *The State v. Herryford*, xix. 377.

78. Rondo is a game of chance within the meaning of this statute. *Glascock v. The State*, x. 508.

bb. Betting.

79. In an indictment under the statute, (Gey. Dig. 427, § 4,) for betting at a faro bank, it is not necessary to set out the particular nature of the game, nor the name of the person with whom the bet was made. *The State v. Ames*, i. 524.

80. And it is sufficient to prove that the defendant bet any piece of money, without showing its denomination. *The State v. Douglass*, i. 527.

81. In an indictment under the statute for gaming, (R. S. 1835, 208, § 16,) if the offense charged be described in the words of the statute, it is sufficient. *Spratt v. The State*, viii. 247.

82. And an indictment for betting on any game prohibited by statute, need not allege that the game was played in the county in which the bet was made. The betting is the offense, and it matters not where the game was played. *The State v. Kyle*, x. 389.

83. An indictment under the statute, (R. S. 1845, 402, § 16,) charging that the defendant did, on, &c., "unlawfully bet a sum of money, to wit, fifty cents, at and upon a game of chance, played with and by means of half dollars and cracks in the floor of a house, which said half dollars and cracks was then and there a gambling device, adapted, devised and designed for the purpose of playing games of chance for money and property," is sufficient. *The State v. Flack*, xxiv. 378. *The State v. Charles*, xxiv. 379. *The State v. Sutton*, xxiv. 380.

84. Under this act, it is indictable to bet money or property on any gambling device whatever. *The State v. Bates*, x. 166.

85. And every distinct act of betting, even at the same sitting, is a separate

offense, for which the person is liable to indictment. *Forney v. The State*, xiii. 455.

86. But to furnish another with money to set up a faro bank, and receive a part of the winnings, is not an offense against the statute. *O'Blennis v. The State*, xii. 311.

cc. *Betting on Election.*

87. An indictment under the statute, (R. S. 1845, 404, § 27,) which charges that the defendant, "on, &c., at, &c., did then and there unlawfully bet property of a specified value on the result of an election which was held in a certain congressional district, in this State, on a specified day of the year, between specified parties, who were then and there running as candidates to represent the said district in Congress, said election then and there being authorized by the constitution of the United States and by the laws of this State," &c., is good. *The State v. Ragan*, xxii. 459.

88. So an indictment, which charges that the election was for a Probate Judge of the county, and was held on a specified day, and was authorized by the laws of the State, is sufficient. *The State v. Banfield*, xxii. 461.

89. And an indictment under that statute may be good, although the sum bet on the result of the election was not stated therein. *The State v. Bridges*, xxiv. 353.

90. So an indictment charging A. and B. with betting on the result of an election, is good, although it be not expressly charged that they bet with each other. *The State v. Smith*, xxiv. 356.

91. But an indictment which charged in the same count A. and B. with betting on the result of an election, and C. with becoming stakeholder, was held to be defective, the offenses charged being separate and distinct. *The State v. Bridges*, xxiv. 353.

v. GUARDIAN'S CARNAL KNOWLEDGE OF WARD.

92. The statute, (R. S. 1835, 207, § 9,) applies to the case of any person (whether guardian or not) who is intrusted with the care of a white female under the age of eighteen years, and who shall have carnal knowledge of her. *The State v. Acuff*, vi. 54.

w. KILLING AND MAIMING CATTLE.

93. An indictment under the statute, (R. S. 1845, 364, § 57,) which charges that the defendant "did unlawfully, &c., kill a certain horse beast, to wit: one mare, then and there the property of," &c., is sufficient. Courts will take judicial notice that horses are included in the term "cattle," as used in that section. *The State v. Hambleton*, xxii. 452.

94. And so that mares are cattle. *The State v. Clifton*, xxiv. 376.

95. And in such indictment it is not necessary to charge malice against the owner of the animal killed, nor to state the manner of killing. *The State v. Hambleton*, xxii. 452.

96. Buffaloes, although domesticated, are not "cattle," within the meaning of the statute. (R. S. 1845, 364, § 57.) *The State v. Crenshaw*, xxii. 457.

See *INFRA*, 186.

X. LARCENY.

97. An indictment charging the defendant with stealing a book is sufficient, without setting out the title of the book. *The State v. Logan*, i. 532.

98. And where bank notes are charged to have been stolen, it is not necessary to allege that the bank was a chartered institution, authorized by law to issue such notes. (R. S. 1835, 491, § 20.) *McDonald v. The State*, viii. 283.

99. An indictment which charged the defendant with stealing five red cows of the value of fifteen dollars each, five black cows of the value of fifteen dollars each, &c., all the property of A., is good. *Wein v. The State*, xiv. 125.

100. Although petit larceny is not, by statute, a felony, yet a charge in an indictment that the larceny was feloniously committed, will not vitiate it. *The State v. Joiner*, xix. 224.

101. In an indictment for horse-stealing, in order to rebut proof of the defendant's admission of the fact, it is not admissible for the defendant to show that, when engaged in horse-trading, he was in the habit of drinking; and, when in liquor, of telling false and inconsistent tales as to the manner in which he obtained his horses. *Whitney v. The State*, viii. 165.

102. Where property other than that mentioned in the indictment is found in the defendant's possession, there may be reason for proving it to have been stolen, in order to fix upon him a guilty knowledge; but where the property stolen is found in the possession of another, with whom the defendant was only an employee, the evidence is inadmissible. *The State v. Wolff*, xv. 168.

103. Possession of stolen property after a theft has been committed, to raise presumption of guilt, must have been near the time of the theft. *Ibid.* *The State v. Floyd*, xv. 349.

104. A. was jointly indicted with B. for grand larceny, but was tried separately. Among other proofs showing a joint committal of the larceny, a letter was introduced written by A. to C., telling C. that parties were on his track, and urging him to caution in making his escape—*Held*, that such letter might be produced in evidence against A., although no proof existed that B. and C. were one and the same person. *The State v. Barton*, xix. 227.

105. A bank note is personal property, and the subject of larceny within the meaning of the statute. (R. S. 1835, 178, § 32.) *McDonald v. The State*, viii. 283.

106. Petit larceny is a trespass, within the meaning of the statute, (R. S. 1835, 481, § 22,) and the name of the prosecutor must be indorsed on the indictment. *Scott, J., dis.* *The State v. Hurt*, vii. 321. *The State v. Sights*, vii. 321.

107. Under the statute of 1835, (R. S. 1835, 179, § 42,) the hirer of a horse, who, either at the time he gets possession or afterwards, conceives the design of stealing him, and takes him away with that purpose, is guilty of larceny. *Norton v. State*, iv. 461.

108. The stealing of several articles at the same time and place constitutes but one offense, although the property stolen is owned by different persons. *Lorton v. The State*, vii. 55.

109. A felonious intent must be shown to exist in cases of grand larceny. *The State v. Gresser*, xix. 247.

110. And the intention to steal must be formed at the time of taking the goods. *The State v. Conway*, xviii. 321.

111. Where the taking is under a *bona fide* claim of right, it is not larceny. *Witt v. The State*, ix. 663.

112. Nor is it larceny where the property is taken under a fair color of claim or title. *The State v. Homes*, xvii. 379.

113. Or upon the direction of another, to whom the respondent believed it belonged. *The State v. Matthews*, xx. 55.

114. The finder of lost property which has no marks upon it by which the owner can be ascertained, is not guilty of larceny, though he take it *animo furandi*. *The State v. Conway*, xviii. 321.

115. But a purse accidentally left on the counter of a store is not lost, and a party who takes it with a felonious intent is guilty of larceny. *The State v. McCann*, xix. 249.

116. Marking a hog, or altering the mark of a hog, is not felony under the statute, (R. S. 1845, 360, § 38,) unless done with intent to steal or convert it to the use of the person doing it. *The State v. Matthews*, xx. 55.

See *INFRA*, 232, 233.

y. MALPRACTICE—See *INFRA* 140, 141.

z. MAYHEM.

117. In an indictment under the statute, (R. S. 1835, 171, § 35,) the circumstances attending the commission of the offense must be alleged, and are sufficiently stated thus: "That on, &c., at, &c., with force and arms, did feloniously make an assault on the body of one G., with a large iron auger, and then and there did feloniously wound, disfigure and inflict on the body of said G., with the said auger, great harm." The words in this section, "in a case and under circumstances," may be rejected as surplusage. *Scott, J., dis. Jennings v. The State*, ix. 852. *Carrico v. The State*, xi. 579. *The State v. Magrath*, xix. 678. And see *The State v. Bailey*, xxi. 484. *The State v. Bohannon*, xxi. 490. *The State v. York*, xxii. 462.

118. Time is not material in an indictment under the statute, (R. S. 1845, 351, § 38,) so that the offense is alleged and proved to have been committed within the year before the finding of the indictment. *The State v. Magrath*, xix. 678.

119. No venue to the wounding is necessary, if there is a venue to the assault and stroke which caused it. *Scott, J., dis. The State v. Freeman*, xxi. 481. *The State v. Bailey*, xxi. 484.

120. An indictment against several under the statute, (R. S. 1845, 351, § 38,) which charged that "they, with a knife, which they then and there with their right hand held, made an assault," is bad. *The State v. Gray*, xxi. 492.

121. An indictment under this statute, which charges that the defendant feloniously assaulted and wounded M. D., wife of D. D., with a large stone held in his hand, &c., alleged to have been a deadly weapon, likely to produce great bodily harm and death, and her, the said M. D., did then and there strike, beat,

wound and ill-treat with great force, which was likely to produce death, &c., is sufficient. *The State v. Leonard*, xxii. 449.

122. But an indictment which charges that the defendant "feloniously made an assault on the body of one C. H., &c., and did then and there inflict on the said C. H. great bodily harm," &c., is defective in not alleging that the bodily harm was inflicted feloniously. *The State v. Feaster*, xxv. 324.

123. As to what constitutes a wounding within the meaning of this statute. *The State v. Leonard*, xxii. 449.

(a.) MURDER.

aa. Indictment.

124. In an indictment for murder, where the killing is charged to have been from a battery, it is also necessary to aver an assault. *McBRIDE, J., dis. Lester v. The State*, ix. 658.

125. And the time of the stroke and the time of the death must be alleged. The words "instantly did die," do not sufficiently charge time and place. *McBRIDE, J., dis. Ibid.*

126. An indictment for murder in the first degree, must set forth with accuracy the manner in which the murder was committed; if by poison or by lying in wait, it must be so stated, and if by any other kind of wilful, deliberate and premeditated killing, the circumstances must be set forth intelligibly. *The State v. Jones*, xx. 58.

127. An indictment, charging that the accused did "strike and thrust," the deceased "in and upon the left side of the belly, and also in and upon the right shoulder, giving him then and there, in and upon the left side of the belly, and also in and upon the right shoulder, one mortal wound," &c., is bad. *Ibid.*

bb. Evidence.

128. What constitutes "wilful, deliberate and premeditated killing," and the evidence requisite to sustain that averment in an indictment. *Bower v. The State*, v. 364.

129. Deliberation, premeditation and malice may be inferred from the circumstances connected with the killing. *Green v. The State*, xiii. 382.

130. As to murder in the first and second degrees as defined by the statute. (R. S. 1855, 558, §§ 1, 2.) *The State v. Phillips*, xxiv. 475.

131. Evidence is inadmissible in behalf of a party on trial for murder to show, that by reason of his weak and crippled condition of body, he was rendered nervous and peculiarly sensitive to fear from external violence, although he was deformed from infancy. *The State v. Shultz*, xxv. 128.

132. Where an indictment, under the statute, (R. S. 1855, 558, § 1,) charged the murder to have been done "wilfully, deliberately and premeditatedly," but did not allege that the murder was committed in the perpetration or attempt to perpetrate a robbery; and from the evidence the motive for the deed appears to have been for the purpose of robbing the deceased—*Held*, that there was no variance. *The State v. Worrell*, xxv. 205.

133. As to evidence sufficient to sustain the charge of murder in the first degree. *The State v. Packwood*, xxvi. 340.

134. To constitute murder in the first degree, the act of killing must be intentional, and done without justifiable cause. *The State v. Hicks*, xxvii. 588.

135. Where a homicide is committed, under circumstances that leave it in doubt whether the act was committed maliciously or from an apprehension of real danger, the jury may consider the fact that the deceased was of a rash, turbulent and violent disposition, in determining whether the accused had reasonable cause to apprehend great personal injury to himself. *Ibid.*

cc. *Malice.*

136. Where malice existed at the time of the killing it is sufficient, and it is not necessary to prove that it existed any length of time previous. *Green v. The State*, xiii. 382.

137. Every deliberate and intentional killing is murder in the first degree, although the design to kill was formed but a moment before it was executed. *The State v. Dunn*, xviii. 419. *The State v. Jennings*, xviii. 435.

138. And to constitute murder in the first degree, it is not necessary that the fatal stroke be given with the specific intent to kill; it is sufficient if it be given wilfully and maliciously, and with the intent to inflict great bodily harm. *The State v. Nueslein*, xxv. 111.

139. Where one wilfully shoots and kills another in malice, it is murder in the first degree. *The State v. Shoultz*, xxv. 128.

See *INFRA*, 375.

dd. *Manslaughter.*

140. Where a person assumes to act as a physician, and prescribes with an honest intention of curing the patient, but through ignorance of the quality of medicine, or the nature of the disease, or both, the patient dies in consequence of the treatment, he is not guilty of murder or manslaughter. *Rice v. The State*, viii. 561.

141. But if the party prescribing have so much knowledge of the fatal tendency of the prescription, that it may be reasonably presumed that he administered the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter, though he might not have intended any bodily harm to the patient. *Ibid.*

142. A killing in resisting an illegal arrest is manslaughter, in the absence of proof of express malice. *Roberts v. The State*, xiv. 138.

143. The use of a deadly weapon, in resisting an illegal arrest, is not sufficient to constitute the killing murder. *Ibid.*

ee. *Insanity.*

144. Upon the trial of an indictment for murder in the first degree, the defendant placed his defense upon the ground, that at the time the act was committed he was incapable of crime, by reason of insanity—*Held*, that if he failed

to establish his defense to the satisfaction of the jury, they were bound to find him guilty of murder in the first degree. *Baldwin v. The State*, xii. 223.

145. And he is not entitled to the benefit of a mere doubt whether he was or was not sane. *The State v. Huting*, xxi. 464.

146. Where insanity is relied upon as a defense to an indictment for murder in the first degree, it is competent for a witness to give his opinion as to the state of mind of the defendant prior to and at the time the act was committed. *Baldwin v. The State*, xii. 223. See *Clary v. Clary*, 2, N. C. Rep. 78.

147. Partial insanity is not necessarily an excuse for a homicide, and can only be so where it deprives the party of his reason in regard to this particular act. *The State v. Huting*, xxi. 464. See *The State v. Worrell*, xxv. 205.

ff. Intoxication.

148. Intoxication is no excuse, and can afford no extenuation, of the crime of murder. *The State v. Harlow*, xxi. 446.

149. Nor can it be taken into consideration by the jury, in determining whether a person committing a homicide acted wilfully, deliberately and pre-meditatedly, so as to constitute the crime murder in the first degree. *RICHARDSON, J., dis. The State v. Cross*, xxvii. 332.

gg. Practice—Questions for the Court.

150. What constitutes a killing in self-defense, is a question of law for the court. *Harper v. Phoenix Insurance Co.*, xviii. 109.

151. So as to the sufficiency of the provocation to make what would otherwise be a murder, a less offense. *The State v. Dunn*, xviii. 419. *The State v. Jones*, xx. 58.

See *INFRA*, 189, 340–344, 350–353.

(b.) OBSCENITY.

152. The utterance in public of words grossly obscene, in such a manner as to outrage decency and be injurious to public morals, though not an open and notorious act of public indecency within the statute, (R. S. 1855, 624, § 8,) is a misdemeanor at common law, and punishable as such. *The State v. Appling*, xxv. 315.

(c.) PERJURY.

153. An indictment against H. for perjury, committed upon the trial of one P. for larceny, must show that the larceny for which P. was tried was either made felony by statute, or was such as amounted to felony at common law. (R. S. 1825, 299, § 56.) *Hinch v. The State*, ii. 158.

154. It should also be alleged that the facts sworn to by H., in which the perjury is charged to have been committed, were material to the issue. *Ibid.*

155. In an indictment against a person for perjury, committed on the trial of a cause to which he was a party, it must be averred that he was sworn under circumstances which authorized his being a witness in the case. *The State v. Hamilton*, vii. 300.

156. Good character is evidence, but not strong, in favor of the accused on trial for perjury. *Schaller v. The State*, xiv. 502.

157. It is wrong to instruct the jury that "the want of motive or interest to swear falsely is a circumstance from which they are at liberty to infer that the testimony of the defendant was not wilfully and corruptly false." *Ibid.*

158. If perjury was committed in denying the existence of a fact, it is none the less so because the witness, on cross-examination, admitted what he had before denied. *Martin v. Miller*, iv. 47.

159. To constitute perjury, the party must have wilfully and knowingly sworn falsely to some matter material to the issue on trial. *Ibid.*

160. And it is sufficient that the evidence was material to any collateral matter or of inquiry on the trial. *The State v. Lavalley*, ix. 824.

161. And where, upon an examination by the court as to the sufficiency of the security offered on a recognizance, the security is sworn, and testifies with wilful falsity, it is perjury. *Ibid.*

162. If the court have jurisdiction of the parties and the subject matter, it is not necessary that the proceedings should be strictly regular to constitute false swearing perjury. *Ibid.*

163. Drunkenness is no excuse for crime, (in this case perjury.) *Schaller v. The State*, xiv. 502.

(d.) RAPE.

164. An indictment under the statute, (R. S. 1845, 348, § 26,) for an assault upon a female child under ten years of age, "with the intent then and there carnally, unlawfully and feloniously to ravish, and carnally and feloniously know," &c., is sufficient, the words "to ravish" being rejected as surplusage. *McComas v. The State*, xi. 116.

165. But an indictment under the statute, (R. S. 1845, 350, § 37,) must charge an assault with intent to ravish. *The State v. Ross* xxv. 426.

166. An indictment under § 31, R. S. 1835, p. 171, charging an assault with weapons, with intent to commit a rape, is not sustained by proof of an assault upon a child under ten years of age, with intent, &c., (See § 23, p. 170,) but without proof of violence and the use of weapons. The indictment, *Per M'Girk, J.*, should have been framed under § 34, p. 171. *Humphries v. The State*, v. 203.

167. The bad character of the parents of the prosecutrix is not admissible evidence in behalf of a party charged with rape. *The State v. Anderson*, xix. 241.

See *INFRA*, 184, 185, 188.

(e.) RESCUE.

168. An indictment for a rescue should state the nature and cause of the imprisonment of the person rescued; it should also state whether the person from whom the rescue was made was a public officer or a private person. *The State v. Hilton*, xxvi. 199.

169. If a rescue be made from a private person, there is no offense, unless the rescuers knew that the person in custody was under arrest for a felony or misdemeanor. *Ibid.*

(f.) RESISTING OFFICER.

170. An indictment for obstructing an officer in the execution of process must recite the writ, that the court may see that it was such a writ as the officer had a right to execute. *The State v. Henderson*, xv. 486.

171. But in an indictment for obstructing and resisting a constable in the service of an execution which was set forth in the indictment, it is not necessary to allege that a judgment was rendered upon which the execution issued. *The State v. Dickerson*, xxiv. 365.

(g.) RIOT.

172. An indictment for a riot, under the statute, (R. S. 1835, 202, § 6,) alleging an "intent to make an assault," must charge it to have been "with force and violence." It is not sufficient to charge it to have been "with force and arms." *Martin v. The State*, ix. 283.

173. In an indictment under the statute, (R. S. 1845, 394, § 6,) the omission of the word "did" before the words "assault, beat and maltreat," was supplied by intendment, and the words "with intent" were rejected as surplusage. *The State v. Edwards*, xix. 674.

174. And an indictment under this statute, which charges that the defendants "did unlawfully assemble together and mutually agree," &c., is good. *The State v. Berry*, xxi. 504.

175. The name of the prosecutor must be indorsed on a bill of indictment for a riot, before the bill is returned by the grand jury. (See R. S. 1835, 481, §§ 22, 24—493, § 8—202, § 6.) *The State v. McCourtney*, vi. 649. *McWaters v. The State*, x. 167.

176. But such indorsement need not be on the back of the indictment. *Williams v. The State*, ix. 268.

177. The fact that three or more persons, acting in concert, jointly beat and wound another, raises no presumption of law that they assembled with that intent, or that, being assembled, they agreed mutually to assist each other to inflict such wounds, within the statutes, (Acts 1854—5, 455, § 2—R. S. 1855, 618, § 6.) *The State v. Kempf*, xxvi. 429.

178. An instruction is erroneous which tells the jury that, "in riotous and tumultuous assemblies, all who are present and not actually assisting in the suppression in the first instance, are, in presumption of law, participants, and the obligation is cast upon a person so circumstanced to prove his non-interference." *The State v. McBride*, xix. 239.

179. To constitute a person a rioter at common law it is not necessary that he should be actively engaged in the riot; it is sufficient that he be present, giving countenance, support or acquiescence. *Williams v. The State*, ix. 268.

180. In order to constitute a riot under the statute, (R. S. 1845, 394, § 6,) it is necessary that the act done, or attempted, should be an unlawful act, and done in a violent and turbulent manner. *Smith v. The State*, xiv. 147.

181. The common law concerning the offense of riot is not in force in this State. *Ibid.* See *INFRA*, 311.

(h.) RUNNING HORSES.

182. An indictment under the statute for running horses on a public highway, (R. S. 1845, 406, § 43,) which substantially pursues the words of the statute, is sufficient, and matter of aggravation will not vitiate it. But a count which charges that the defendant ran a horse upon the highway, &c., "so as to interrupt travelers," instead of "so as to interrupt travelers thereon," is bad. *The State v. Fleetwood*, xvi. 448.

(i.) SLAVES.

aa. *Offenses committed by.*

183. In all indictments for felony, the offense must be charged to have been committed feloniously, or with felonious intent; and this rule is applicable to an indictment against a slave for administering medicine. *Jane v. The State*, iii. 61.

184. In an indictment against a negro, or mulatto, for an attempt to commit a rape on a white female, which offense is punishable by castration, it is not necessary to aver that the act was done feloniously or with a felonious intent. (R. S. 1835, 170, § 28.) *Nathan v. The State*, viii. 631.

185. An indictment of a negro for an attempted rape is properly framed upon the first clause of § 31, Art. II, of the act relating to crimes and punishments, (R. S. 1845, 349,) without reference to § 37, which is only applicable when that crime is committed by a white person. *The State v. Anderson*, xix. 241.

186. An indictment, under the statute (R. S. 1845, 364, § 57,) against a slave for maliciously killing a mare, must charge the act to have been done "feloniously." *The State v. Gilbert*, xxiv. 380.

187. Under the act of February 6, 1836, relating to the punishment of certain felonies when committed by a slave, (Acts 1836-7, 60,) it is not necessary that the indictment should be indorsed by the prosecutor. *Lucy v. The State*, viii. 134.

188. At the trial of a negro upon an indictment for an attempt to ravish a white female, the jury is at liberty to find that the averments of the indictment as to color, race and sex are sustained, from seeing the parties in court, and proof that the defendant is a slave. *The State v. Anderson*, xix. 241.

189. By the constitution of Missouri, (Art. III, § 27,) a slave convicted of a capital offense is subjected to the same punishment that a free white person would be for the same offense. A slave is therefore punishable with death for murder, notwithstanding the act of February 6, 1836, relating to crimes, (Acts 1836-7, 60.) *Fanny v. The State*, vi. 122.

190. A freeman who is accessory to a felony committed by a slave, is punishable in the same manner as though the principal were a freeman. (Acts 1836-7, 60.) *Loughridge v. The State*, vi. 594.

bb. *Offenses by others relating to slaves.* See SLAVES AND SLAVERY, 33-42.

(j.) SUNDAY.

aa. *Laboring.*

191. An indictment, under the statute prohibiting the doing of any labor on Sunday, "other than the household offices of daily necessity, or other work of

necessity or charity," (R. S. 1845, 404, § 31,) charging that the labor done was not "a work of daily necessity," is insufficient. *The State v. Stone*, xv, 513.

bb. *Keeping open Dramshop or Grocery.*

192. It is not necessary that an indictment founded on the statute (R. S. 1845, 405, § 34,) for keeping open a grocery on Sunday, should contain the negative allegation that the grocery was not kept open for the sale of drugs, medicines, provisions, or other articles of necessity. *The State v. Sutton*, xxiv, 377.

193. An indictment under the statute, (R. S. 1855, 631, § 36,) charging that the defendant on, &c., at, &c., "did then and there unlawfully keep open a grocery, by then and there permitting persons to enter said grocery, and then and there to drink intoxicating liquors," is good. *The State v. Crabtree*, xxvii, 232.

194. And to authorize the conviction of a grocery keeper on such an indictment, it is not sufficient that he permits persons to enter his grocery on Sunday and to drink intoxicating liquors there. It must appear that the acts done by him are done for the accommodation of customers, and in continuation of the usual business of the week. *Ibid.*

195. Although time is of the essence of the offense for a breach of the Sunday law, (R. S. 1835, 209, § 31,) it is immaterial on what particular Sunday (within the year preceding the finding of the indictment) the offense was committed, whether on the Sunday laid in the indictment or not. *Frasier v. The State*, v, 536.

196. The selling of spirituous liquors after nine o'clock on Sunday is indictable, although the party selling has a license to vend spirituous liquors. The privilege conferred by the license is subject to the restraints imposed by the general law in force when the license is granted. (See R. S. 1835, 209, § 31.) *Lambert v. The State*, viii, 492. *Gouin v. The State*, viii, 493. *Brua v. The State*, viii, 496. *The State v. Ambs*, xx, 214.

197. To keep open an alehouse, and to sell ale on Sunday, are two distinct offenses, under the statute of 1845 (R. S. 1845, 405, § 34); and where an indictment contains two counts, one for each offense, the defendant is subject to two fines. *The State v. Ambs*, xx, 214.

(k.) VAGRANTS.

198. Where A., charged as a vagrant, is released on condition that he will leave the place where he was arrested, within a certain time, a police officer has no right to arrest him without a warrant, for the reason that he was found in that place after the expiration of such time. *Roberts v. The State*, xiv, 138.

199. And where in attempting his re-arrest, without a warrant, B., a watchman and a member of the police, was killed, and A. was indicted for his murder—*Held*, that his breach of promise constituted no legal ground for his re-arrest; that it was necessary to show that B. was a watchman and a member of the police, and that A. was guilty of a violation of the city ordinances, or that he was a vagrant within the purview of the same; and that it was not necessary

to aver in the indictment that A. was a vagrant, or that B. was a police officer, as it would be in an indictment for resisting an officer in the discharge of his duty. *The State v. Roberts*, xv. 28. *The State v. Jones*, xvi. 388.

II. INDICTMENT.

a. FORM AND ALLEGATIONS.

200. If the facts, as to time and place, are stated with repugnancy or uncertainty, the indictment is bad. *The State v. Hardwick*, ii. 226. *Jane v. The State*, iii. 61. *The State v. Hayes*, xxiv. 358.

201. Thus, when two counties have been previously named in an indictment, "the county aforesaid" is not a sufficient venue. *The State v. McCracken*, xx. 411.

202. It is not error for an indictment to charge several distinct facts, where they constitute only one offense. *The State v. Palmer*, iv. 453.

203. One good count in an indictment will support a general verdict, no matter how many defective counts there may be. *The State v. Jennings*, xviii. 435. *The State v. Bean*, xxi. 269.

b. CAPTION AND CONCLUSION.

204. In an indictment reciting that the grand jurors were "empannelled, sworn and charged," the time and place need not be laid to show when and where they were sworn. *Vaughn v. The State*, iv. 530.

205. The caption forms no part of an indictment. *Kirk v. The State*, vi. 469.

206. An indictment which does not conclude, "against the peace and dignity of the State," is bad. *The State v. Lopez*, xix. 254.

207. An indictment commencing thus, "State of Missouri, county of Hickory. The grand jurors for the State of ———, empannelled, charged and sworn," is sufficient. *The State v. England*, xix. 386.

208. The omission of the word "present" in the commencement of an indictment, is not a valid objection to it. SCOTT, J., *dis.* *The State v. Freeman*, xxi. 481.

c. NAME OF DEFENDANT.

209. The middle name of a person is no part of the Christian name, and an indictment which sets out only that name, is bad, when objected to for that cause by plea in abatement. *The State v. Martin*, x. 391.

d. JOINDER OF DEFENDANTS.

210. Several persons may be jointly indicted for any offense which may be committed by several, as (in this case) for keeping a ferry. [*Vaughn v. The State*, iv. 530, EXPLAINED.] *The State v. Gay*, x. 440.

211. In such indictment it is not necessary to allege that the defendants were partners, since there is no partnership in crime. *Ibid.*

212. And where several are jointly indicted, the punishment of each must be

separately assessed. *Ibid.* *Barada v. The State*, xiii. 94. *The State v. Berry*, xxi. 504.

See BANKING, 3.

e. VENUE.

213. If the venue is laid in the body of an indictment at the "township of St. Louis," it is sufficient, as it will be referred to the "county" in the margin. *The State v. Palmer*, iv. 453.

214. And where the name of the county is written in the margin of an indictment, and in the body of it the county is referred to as "the county of Washington aforesaid," the venue is well laid. [OVERRULING *The State v. Cook*, i. 547.] *McDonald v. The State*, viii. 283.

215. So where an indictment commencing thus, "the grand jurors for the State of Missouri, for the county of St. Louis," &c., lays the venue "at the county aforesaid," it is well laid. *The State v. Ames*, x. 743.

216. If in an indictment for aiding and abetting a murder, a venue is laid to the murder itself, and it is stated that the defendants were then present, aiding and abetting, &c., this is sufficient. *The State v. Taylor*, xxi. 477.

217. An indictment was in this form, "the grand jurors for the State of Missouri, for the body of Putnam county, &c., present that B. E. G., late of Putnam county aforesaid, &c., at the county aforesaid, did then and there," &c.—*Held*, that the venue was properly laid to the commission of the offense. *The State v. Goode*, xxiv. 361.

See SUPRA, 201.

f. TIME WHEN OFFENSE WAS COMMITTED.

218. In an indictment in two counts, the time of committing the offense was alleged in the first count only, as to which a *nol. pros.* was entered—*Held*, on motion in arrest that the first count was not thereby rendered null, and that the second count, which referred to the first, was sufficient. *Wills v. The State*, viii. 52.

219. An indictment, laying an offense on a future or impossible day, is bad. *Markley v. The State*, x. 291.

220. The failure in an indictment to state the time when the alleged offense was committed, is a fatal defect. *Erwen v. The State*, xiii. 306.

221. But it is otherwise where time is not of the essence of the offense. (R. S. 1855, 1176, § 27.) *The State v. Stumbo*, xxvi. 306.

222. Where an indictment is quashed, and the period within which the prosecution should be commenced has elapsed, a second indictment may lay the offense within the time limited for its prosecution. On the trial the prosecution may show the facts which bring it within the exception of the statute, (R. S. 1825, 323, § 41.) *The State v. English*, ii. 182.

223. But where, after the first indictment has been quashed, and the second indictment, in order to avoid the statutory bar, undertakes to set out the proceedings under the first, they must be stated with all the certainty required in charging the commission of the offense. *Ibid.*

224. A person who commits an offense against a statute while it is in force, may be indicted and punished after the act against which the offense was committed, has been repealed. (See R. S. 1845, 698, §§ 15, 16.) *The State v. Mathews*, xiv. 133.

g. INDORSEMENT.

225. An indorsement on an indictment in these words, "a true bill," and signed by the foreman of the grand jury, is a sufficient certifying of the indictment. (See R. S. 1835, 481, § 19.) *Spratt v. The State*, viii. 247. *McDonald v. The State*, viii. 283.

226. The provision of § 19, Art. III, of the statute relating to practice and proceedings in criminal cases, (R. S. 1845, 866,) requiring the foreman of the grand jury to certify under his hand, that the indictment is a true bill, is merely directory, and it is too late after the conviction to raise the objection that the indictment was not so certified. *The State Mertens*, xiv. 94.

227. But although the failure of the foreman to certify an indictment to be a true bill, is no cause for arrest of judgment after a trial and conviction, it is ground for quashing the indictment before trial. *The State v. Burgess*, xxiv. 381.

228. The failure of the clerk to enter upon an indictment the day of its return by the grand jury into court, does not authorize the court to discharge the defendant. *The State v. Clark*, xviii. 432.

229. By the statute, (R. S. 1845, 866, § 22,) an indictment must be quashed, unless the name of a prosecutor is indorsed as such thereon, unless it comes within the statute exceptions. *The State v. Joiner*, xix. 224.

h. SIGNATURE OF CIRCUIT ATTORNEY.

230. Under the statute, (R. S. 1835, 458, § 6,) it is not necessary for the circuit attorney to subscribe his name to indictments. *Thomas v. The State*, vi. 457.

i. JOINDER OF COUNTS.

231. A count for misdemeanor only, cannot be joined with one for felony. *Hilderbrand v. The State*, v. 548.

232. Under the statute (R. S. 1845, 357, § 24,) a person may be indicted in the same count for burglary and either grand or petit larceny. *The State v. Smith*, xvi. 550.

233. Counts for larceny and embezzlement may be joined in the same indictment; and where they relate to the same transaction it is not error to refuse to compel the prosecutor to elect upon which count he will proceed. *The State Porter*, xxvi. 201.

j. WHAT ACTS ARE OR ARE NOT INDICTABLE.

234. By §§ 29, 30, art. 9, (R. S. 1835, 215,) of the act relating to crimes, the jurisdiction of the Circuit Court over offenses punishable by fine not exceeding \$100, is taken away, and such offenses are therefore not indictable. *Williams v. The State*, iv. 480.

K. MOTION TO QUASH.

235. Where one of two counts in an indictment is good, a motion to quash will not lie, and ought not to be sustained in an indictment for a felony. The defendant should demur or move in arrest. *The State v. Rector*, xi. 28.

236. In such a case, the defendant should move to quash the defective count, and not the whole indictment. *The State v. Wishon*, xv. 503.

237. An indictment may be quashed for causes not appearing on its face. The action of the court, and the grounds thereof, in such a case, should be made part of the record, by bill of exceptions. *The State v. Batchelor*, xv. 207. *The State v. Kitchen*, xv. 207. *The State v. Wall*, xv. 208.

238. It is not necessary to quash the bad counts in an indictment, but the Supreme Court will not reverse a judgment because a lower court has done so. The rule that an indictment is an entire thing, has never prevailed in this State. *The State v. Woodward*, xxi. 265.

239. Nor will they reverse because the court below refused to quash the complaint or indictment. *The State v. Conrad*, xxi. 271.

L. NEGATIVE EXCEPTIONS.

240. An indictment upon one section of a statute need not negative an exception in a subsequent section. It may be left to the defendant to bring himself within the exception. *The State v. Shiffett*, xx. 415.

III. PLEA IN ABATEMENT.—See *INFRA*, 326–328.N. FOR DIFFERENT OFFENSES.—See *THEIR TITLES*.

For Practicing Law without License. See *ATTORNEY AT LAW*, III.

For Auctioneering without License. See *AUCTIONEERS*, V.

For Illegal Banking. See *BANKING*, I.

For Keeping Billiard Table without License. See *BILLIARD TABLES*.

For Assault and Battery. See *BREACHES OF THE PEACE*, 8–10.

For Selling Intoxicating Liquors without License. See *DRAM SHOPS*, 10–26.

For Keeping Ferry without License. See *FERRY*, VI.

For Solemnizing Marriage of Minor. See *HUSBAND AND WIFE*, 3, 4.

For Trading with Indians. See *INDIANS*, 2.

For Misdemeanor in Office. See *JUSTICE OF THE PEACE*, III.

For Selling Lottery Ticket. See *LOTTERY*, 2–5.

For Selling Merchandise without License. See *MERCHANTS AND GROCERS*, 1–3.

For Vending Clocks without License. See *PEDDLERS*, 2.

For Neglect of Duty. See *ROADS AND HIGHWAYS*, IX.

For Trespassing on School Lands. See *SCHOOL LANDS*, II.

For Selling Liquor to Slave. See *SLAVES AND SLAVERY*, 35–37.

For Hiring Slave without Master's Consent. See *SLAVES AND SLAVERY*, 40.

For Meeting with Slaves. See *SLAVES AND SLAVERY*, 41.

For Dealing with Slave. See *SLAVES AND SLAVERY*, 42.

For Killing a Stray. See *STRAYS*, 7.

III. BAIL,

a. BAILABLE OFFENSES.

241. By the constitution of this State every offense is bailable, except such as are capital. *Shore v. The State*, vi. 640.

242. *Quære*—Whether the finding of an indictment for murder in the first degree renders the presumption of guilt so great as to deprive the Circuit Court of the power to admit to bail. *Ibid*.

b. JURISDICTION.

243. A sheriff has no power to admit to bail in criminal cases, and suit cannot be maintained on a bail bond taken by him in such cases. *The State v. Walker*, i. 546.

244. The judges of the Supreme Court had not, under Art. V. of the Constitution, in the absence of statutory authority, the power to take recognizance in cases of felony. *Todd v. The State*, i. 566.

245. A single justice is not authorized, under the statute, (R. S. 1825, 314, § 5,) to take the recognizance of a person under arrest, on a *capias* issued upon an indictment found in the Circuit Court. *The State v. McGunnege*, iii. 402.

246. Where an indictment for felony is pending before the St. Louis Criminal Court, the Judge of the St. Louis Circuit Court is not authorized to let to bail the person so indicted, and a recognizance entered into before him for the appearance of the accused before the St. Louis Criminal Court is void, *The State v. Ramsey*, xxiii. 327.

247. After a Justice issues his warrant of commitment, and delivers the same to the sheriff, the prisoner can be discharged from custody on bail or otherwise, only by a court or magistrate authorized by law to issue the writ of *habeas corpus*, (R. S. 1845, 862, § 35.) A Justice has no such authority. *The State v. Randolph*, xxvi. 213.

248. The committing justice cannot approve a recognizance taken by another justice; nor can a justice who did not sit at nor assist in the examination, take a recognizance for the appearance of the prisoner. *Ibid*.

249. A justice of a County Court is not authorized to let to bail a person indicted for a bailable offense unless the indictment is pending in his county. *The State v. Nelson*, xxviii.

c. RECOGNIZANCE.

aa. Sufficiency.

250. A recognizance with condition that the recognizor shall appear before the proper court at its next term, &c., but omitting to add "to answer the charge," or "to answer an indictment," is not void for such omission. *The State v. Davidson*, xx. 406.

251. It is not necessary to the validity of a recognizance taken by a Justice, conditioned that a party shall appear in court "to answer an indictment, and not depart without leave," that it should describe the offense with which the party

is charged, or state the facts which gave the Justice jurisdiction, nor need these facts be stated in the writ of *scire facias*. It is sufficient that they appear on the files and entries of the court. *The State v. Randolph*, xxii. 474.

252. The Circuit Court has power, on an appeal from a Justice to require a new recognizance to be given, where the security on the recognizance, entered into before the justice, is insufficient. *The State v. Lavalley*, ix. 824.

253. A motion to quash a recognizance ought not to be heard. The only mode to test its validity is on *scire facias* after forfeiture. *The State v. Davidson*, xx. 406.

254. Where two are jointly indicated, and one only applies for a change of venue, an order removing the cause will be effectual only as to the one so applying, and a recognizance entered into by both to appear in the court to which the cause is removed, is void as to the one not applying for the change of venue. *The State v. Wetherford*, xxv. 439.

bb. *Certificate.*

255. A criminal recognizance taken by a County Court, as such, must be certified under the seal of the court. If taken by the judges as magistrates, it must be certified by them, and not by the clerk of the court. *The State v. Zwifle*, xxii. 467.

256. Where a recognizance is improperly certified, the defect may be amended at any time before the objection is disposed of, on such terms as will protect the party from being prejudiced by it. *The State v. Randolph*, xxii. 474.

cc. *Misnomer.*

257. A recognizance was conditioned for the appearance of *Coonrod* Carpenter, and signed *Conrad* Carpenter—*Held*, that if considered as a misnomer of the Christian name of Carpenter, the error was waived by his failing to plead the misnomer in abatement, and that, by signing the recognizance, he admitted that he was the person therein named. (See R. S. 1835, 501, § 14.) *Carpenter v. The State*, viii. 291.

dd. *Forfeiture and Remission.*

258. A remission by the governor from liability upon a recognizance to appear in one county, cannot be made to apply to a recognizance to appear in a different county. *The State v. Davidson*, xx. 212.

259. A recognizance to appear on the first day of a term of court, is forfeited by the failure of the recognizor to appear on that day. *Shore v. The State*, vi. 640.

260. Where the record shows that two forfeitures of a recognizance were entered at different terms of the same court, the last entry will be treated as surplusage. *The State v. Pepper*, viii. 249.

ee. *Liability of Surety.*

261. The principal and surety in a recognizance to answer an indictment acknowledged themselves each to be bound in a specified sum—*Held*, that their

liability was several, and that a remission by the governor, after forfeiture, in favor of the principal, would not discharge the surety. *The State v. Davidson*, xx. 212.

IV. JURISDICTION.

262. The statute organizing the Circuit Courts, under the Constitution, is the authority of the judge for holding courts and taking jurisdiction in capital cases, and it is immaterial that it does not appear that he was particularly assigned to do so. *Samuels v. The State*, iii. 68.

263. The keeping of a roulette table, at which a game of chance was played for money, and the inducing and permitting a person to bet thereat, and at which he did bet and loose money, is an offense under § 87 of the act relating to crimes and punishments, (R. S. 1825, 309,) for which a Justice has jurisdiction to issue his warrant and cause the offender to be apprehended. (See R. S. 1825, 314, § 5.) *Ex parte Bishop*, iv. 219.

264. The Act of February 13, 1839, (Acts 1838-9, 101,) giving Justices jurisdiction of the offense of disturbing a religious congregation, is in aid of the R. S. 1835, 209, § 27, and the Circuit Court and Justices have concurrent jurisdiction of such offenses. *Clay v. The State*, vi. 600.

V. CHANGE OF VENUE.

a. CAUSE.

265. The fact that the party indicted for murder is the slave of the judge holding the court where the indictment is pending, creates an interest in such judge in the result of the cause, and entitles the defendant to a change of venue, and the statute makes it the imperative duty of the judge, in such a case, to change the venue, on application therefor by the prisoner. (R. S. 1825, 276, § 23.) *Jim v. The State*, iii. 147.

266. The statute authorizing a change of venue in criminal cases is imperative whenever a case is made out in conformity with its requisitions, and it is not left to the discretion of the court to grant or refuse the application as a matter of discretion. *Freleigh v. The State*, viii. 606.

267. Although it is provided by statute that a second change of venue, in the same cause, shall not be allowed, (R. S. 1845, 875, § 28,) yet it may be granted where the judge has been of counsel against the prisoner. *The State v. Gates*, xx. 400.

268. Where the petition of the defendant for a change of venue sets forth one of the statutory grounds for such change, the order removing the cause will not be rendered void by reason of an omission to specify therein the cause of removal. *The State v. Worrell*, xxv. 205.

269. A change of venue cannot be granted on the application of the owner of a slave who is indicted for murder. The slave must petition in person. *Fanny v. The State*, vi. 122.

270. The statute providing for a change of venue in criminal cases, does not apply to causes pending against persons undergoing sentence of imprisonment in the penitentiary. *Golden v. The State*, xiii. 417.

b. NOTICE OF APPLICATION FOR.

271. It is the safer course for the party who wishes a change of venue to give reasonable notice before the calling of the case, and not depend upon filing such notice in open court merely. *The State v. Floyd*, xv. 349.

272. What is reasonable notice of an application for a change of venue depends upon circumstances; and where notice is given so soon as the party learns that he has cause to apply therefor, it will be sufficient even at the time the case is called for trial. *Reed v. The State*, xi. 379. *Golden v. The State*, xiii. 417.

c. TRANSCRIPT.

273. Where, on a change of venue in a criminal case, the papers are not fully certified, the court to which the case is transferred may remand it to have the record perfected, or issue a *certiorari*. *Laporte v. The State*, vi. 208.

274. On a change of venue in a criminal cause, the original indictment should be retained in the office of the clerk in the county where the indictment was found, and a copy of it transmitted with the transcript of the case. *Ruby v. The State*, vii. 206.

275. The time of filing the transcript of a case on change of venue, where the clerk has omitted to state it thereon, may be indorsed after continuance by order of the court. *Day v. The State*, xiii. 422.

d. IRREGULARITY.

276. The judgment of the court ought not to be reversed on application of the defendant on account of the irregularity in the change of venue. *NAPTON, J., dis. Porter v. The State*, v. 538.

e. EVIDENCE.

277. The proceedings upon an application for a change of venue in a criminal case, and the order of the court granting it, are not evidence against the accused. *The State v. Phillips*, xxiv. 475.

See SUPRA, 254, 258.

VI. GRAND JURY.

278. It is the duty of grand juries to make diligent inquiry into all criminal violations of law in their respective counties, and in the performance of such duty they are at liberty to interrogate witnesses generally as to their knowledge of offenses and by whom committed, without limiting the inquiry to any specific case or person; and a witness refusing to answer such general inquiry is liable to imprisonment under § 2 of the statute, (R. S. 1825, 796.) *Ward v. The State*, ii. 120.

279. The defendant, being indicted for murder, moved to quash the indictment on the ground that twelve jurors did not concur in finding it—*Held*, that the affidavits of the grand jurors could not be taken and used to prove that fact. *The State v. Baker*, xx. 338.

280. Under the statute, (R. S. 1845, 865, § 13,) the court is authorized to summon a grand jury at an adjourned term of the court. *The State v. Barnes*, xx. 413.

VII. PETIT JURY.

a. TRIAL BY.

281. Where an indictment is demurred to and the demurrer is overruled, and the defendant refuses or neglects to plead further, a jury should be empaneled to find whether the defendant is or is not guilty. *Thomas v. The State*, vi. 457. *Ross v. The State*, ix. 687. *Maeder v. The State*, xi. 363. *Austin v. The State*, xi. 366. *Lewis v. The State*, xi. 366.

282. Under the statute, (R. S. 1845, 878, § 1,) the court cannot try a defendant in a criminal case upon a plea of not guilty, even by consent of the defendant. *Neales v. The State*, x. 498.

283. But under the revised statutes of 1855, (R. S. 1855, 1189, §§ 1, 2,) the trial of a misdemeanor may be by the court, with the consent of defendant, prosecuting attorney and of the court. *The State v. Moody*, xxiv. 560.

284. A. was put upon his trial for an alleged misdemeanor; after the evidence was closed, the court called the next case, being a case of misdemeanor, empaneled the same jury and heard the evidence, and submitted both cases to the same jury at the same time—*Held*, that the court committed error. *The State v. Devlin*, xxv. 174.

b. VENIRE—RIGHTS OF DEFENDANT.

285. The common law doctrine of *venires* was never adopted in this State. Under the act of 1825, (R. S. 1825, 466,) it is not necessary that a *venire facias* should issue to the sheriff to summon a jury; a verbal command to do so is sufficient. *Samuels v. The State*, iii. 68.

286. Objections to an officer returning a jury must be made before the trial, and cannot be taken advantage of in arrest of judgment. *Ibid*.

287. Where a copy of the indictment in a capital case is not furnished to the defendant as provided by statute, (R. S. 1835, 485, § 1,) and he pleads and goes to trial without raising the objection, he thereby waives the copy. *Lisle v. The State*, vi. 426.

288. The act of February 6, 1837, relating to the summoning of petit jurors for St. Louis county, is merely cumulative. (Acts 1836-7, 70.) *McGunnegle v. The State*, vi. 367.

289. Under the statute, (R. S. 1855, 1190, §§ 5, 7,) where two defendants, jointly indicted, elect to be tried together, they are not entitled to a panel of more than thirty-six jurors. *The State v. Phillips*, xxiv. 475.

290. If a regular panel of jurors be exhausted before a jury is obtained, the defendant is not entitled to have any particular number of bystanders or talesmen summoned from which to complete the jury. *The State v. Buckner*, xxv. 167.

291. In case of an indictment for murder, the defendant is entitled to a panel of thirty-six jurors; also, to have a list of such jurors delivered to him forty-eight hours before the trial. (R. S. 1855, 1190, §§ 7, 8.) The Stoddard county jury act (Acts 1854-5, 531,) does not in any way affect these rights, and the revised code of 1855 governs such proceedings had after May 1, 1856, although the indictment was pending previous to that date. (See *The State v. Phillips*, xxiv. 475.) *Ibid.*

C. CHALLENGE—COMPETENCY.

292. Under the statute, (R. S. 1835, 343, § 13,) the State has three peremptory challenges in a criminal trial. *Mallison v. The State*, vi. 399.

293. Where a juror was challenged for bias, and swore that he had formed an opinion on rumor from the newspapers, but was not prejudiced, and could try the case on the evidence, and the court accepted him, it was *held*, that no error was committed, as the court had accepted the juror on his qualifying himself under the statute. *Baldwin v. The State*, xii. 223.

294. It is no ground for the reversal of a judgment of conviction upon an indictment for murder, that the court, in empanneling the petit jury, required the State and the defendant to exercise their right of peremptory challenge simultaneously, by striking from a list of thirty-six jurors the objectionable names, instead of conforming to the usual and better practice of allowing the right to be exercised as each juror was called to be sworn, after having been found qualified to serve, the State speaking first, and the record not showing that the defendant was prejudiced. *The State v. Hays*, xxiii. 287.

D. DISCHARGING A SELECTED JUROR.

295. The court has power to discharge a juror after he has been empaneled to try a cause and before he has been sworn. It is too late for a defendant to make an objection thereto after the juror has been discharged. *King v. The State*, i. 717.

E. SEPARATION.

296. On the trial of a capital offense, the evidence on the part of the State was closed, and none had been offered by the defense. On the agreement of the parties, and by leave of court, the jury were allowed to disperse till the next morning, when, on the re-opening of the court, several new witnesses were examined by the State, and others re-examined, the defendant objecting—*Held*, that the further examination of witnesses, upon the re-opening of the court, was erroneous. *Mary v. The State*, v. 71.

297. In cases of felony, the jury, after they are sworn, should not be permitted to separate until they have rendered their verdict, and, if permitted to separate, the judgment will be reversed. *McLean v. The State*, viii. 153.

298. But where both parties consent to the separation of the jury, it is no error in the court to permit it. *The State v. Mix*, xv. 153.

299. Where a jurymen, after the rendition of the verdict in a criminal case, absented himself for a short time, without the consent of the court, before the verdict was reduced to form—*Held*, no cause for setting the verdict aside. *Whitney v. The State*, viii. 165.

300. The separation of a jury, in a criminal case, after having written down and sealed their verdict, and delivered the same to the officer in charge of them, though without the consent or order of the court, is not sufficient cause for a new trial. *The State v. Weber*, xxii. 321.

f. DISCHARGING THE JURY.

301. The discharge of a jury on a trial for burglary, after the case is submitted to them, in consequence of the sickness of one of the jurors, is not error. *Hector v. The State*, ii. 166.

g. CONDUCT OF JURY.

302. Where some persons, near the room occupied by a jury and in their hearing, talked aloud upon the subject of the trial, and some one asked the jury how the case was going, or if the jury could not agree, and the answer was that all but one were agreed—*Held*, that this conduct, though very reprehensible, did not afford a sufficient reason for reversing the judgment. *The State v. Bird*, i. 585.

303. The use of intoxicating drinks by a jury, in their retirement, will not vitiate their verdict, unless supplied from an improper source, or used in sufficient quantity to affect their verdict. *The State v. Upton*, xx. 397.

h. QUESTIONS OF FACT.

304. It is error for the court, in its instructions to the jury on a trial for murder, to assume that the name of the deceased is stated correctly in the indictment, that being a question of fact for the jury. *The State v. Dillihunt*, xviii. 331.

305. The weight of evidence is to be determined by the jury alone. *The State v. Upton*, xx. 397.

306. Whether a Justice, in issuing a warrant for the arrest of an individual, did so maliciously, is a question for the jury. *The State v. Allen*, xxii. 318.

307. Whether a weapon used is of a character likely to produce death or great bodily harm, is a question of fact to be passed upon by the jury. *The State v. Nueslein*, xxv. 111.

VIII. PROCEEDINGS IN COURT.

a. ARRAIGNMENT.

308. Where, after a prisoner has announced himself ready for trial, and a witness for the prosecution has been examined in chief, all the witnesses for the

prosecution having been sworn, it is discovered that the prisoner has not been formally arraigned, and, by order of court, he is then arraigned and pleads not guilty, and objects to any further proceedings in the cause, asking that he may be discharged, it is not erroneous to so cause him to be arraigned, nor is it erroneous, the jury having been re-sworn, to proceed to examine the witnesses for the prosecution, without causing them to be re-sworn. *The State v. Weber*, xxii. 321.

309. In all cases in which a person arraigned does not confess the indictment to be true, a plea of not guilty should be entered, and the same proceedings should be had as if he had formally pleaded not guilty. *The State v. Andrews*, xxvii. 267.

b. AUTREFOIS ACQUIT OR CONVICT.

310. A party who has been punished under an ordinance of the city of St. Louis for keeping a roulette table, is not subject to indictment in the State court for the same offense. *The State v. Simonds*, iii. 414.

311. Conviction of riot under the ordinance of St. Louis, before a Justice was no bar to an indictment for the same offense under the act of 1831, since a Justice had no jurisdiction of the matter. *The State v. Payne*, iv. 376.

312. In criminal prosecutions, where a conviction would subject the defendant to capital punishment, or would render him liable to be restrained of his personal liberty, an acquittal by the jury is, by the Constitution, (Art. XIII, § 10,) a bar to any subsequent trial for the same offense. *The State v. Spear*, vi. 644. *The State v. Baker*, xix. 683.

313. An affirmative verdict, in response to an indictment for murder in the first degree, of "guilty of murder in the second degree, in manner and form as charged," &c., is by implication an acquittal of murder in the first degree, and will bar a prosecution for a higher offense. *The State v. Ball*, xxvii. 324.

c. DISCHARGE OF PRISONER.

314. A person who is indicted for an offense, and imprisoned, is not entitled to his discharge under the statute, (R. S. 1845, 881, § 25,) until the end of the second term, after the lapse of the term at which the indictment is found. *Robinson v. The State*, xii. 592.

315. This statute applies alone to pending indictments, and the period of confinement under previous indictments for the same offense, which were dismissed by *nolle prosequi*, or suspended by the finding of a subsequent indictment, are not included. *Fanning v. The State*, xiv. 386.

316. A prisoner is entitled to his discharge under that statute, only when there has been some laches on the part of the State. Neither a term which breaks up in the midst of the trial, on account of the illness of the presiding judge, nor a term in which there is a trial and a failure of the jury to agree, nor one which is limited by law to six days, and in which there is no time for the trial, nor a special term, is counted in favor of the prisoner. *The State v. Hu-ting*, xxi. 464.

317. And where a motion to discharge a prisoner for improper delay in

bringing him to trial was overruled in the inferior court, and the record showed only that the motion had been made, but no proof was saved, it was *held*, that the presumption was that the motion was properly overruled. *Ibid*.

318. The circuit attorney has no authority to make an agreement by which a criminal shall be discharged from the claims of justice. *The State v. Lopez*, xix. 254.

319. And where he made an agreement with defendant as to certain indictments, and entered thereon a *nolle prosequi*—*Held*, that such an entry will not be regarded as a *retraxit*, and that the entry on the record of the *nol. pros.* will have no greater effect in discharging defendant from future prosecution, because of the supposed agreement, than it would without such agreement. *Ibid*.

See SUPRA, 228.

d. DOCKET.

320. An indictment for a felony should not be docketed nor entered upon the minutes or records of the court, unless the defendant is in custody or on bail. *The State v. Corson*, xii. 404.

321. And such omission to enter an indictment and continuances from term to term does not operate a discontinuance of the cause. *Ibid*.

e. CONTINUANCE.

322. Where a cause has been continued until the next regular term, upon the application of the State, it is error for the court three days after to set aside the order of continuance and put the defendant upon his trial at an adjourned term against his consent. *McKay v. The State*, xii. 492.

323. A motion to continue is addressed to the sound discretion of the court, and the Supreme Court will not interfere with the exercise of such discretion, unless it appears to have been used oppressively. *Green v. The State*, xiii. 382.

324. Where, after four continuances granted to the same party, another application was made in his behalf on the ground of the absence of material witnesses, the accompanying affidavit stating generally that due diligence had been used to secure their attendance, and that one witness was sick and unable to attend, yet not showing in what the alleged diligence consisted, the application was properly refused. *The State v. Hays*, xxiv. 369.

f. PLEADING.

325. In prosecutions for felonies, the omission of the *similiter* will not vitiate the proceedings. *Hawkins v. The State*, vii. 190.

326. Under the statute (R. S. 1845, 867, § 4,) a plea in abatement to an indictment, alleging the pendency of another indictment for the same offense, should specifically show that the indictment pleaded to was the one first found, and that the offense charged in each indictment was the same. *Austin v. The State*, xii. 393.

327. After pleading not guilty, a prisoner cannot plead in abatement, without first obtaining leave to withdraw his plea of not guilty. *Sunday v. The State*, xiv. 417.

328. Illegality in summoning a grand jury is no ground for a plea in abatement to an indictment, nor would it, under the statute, (R. S. 1845, 627, § 8,) be any ground for a challenge to the array. *The State v. Bleekley*, xviii. 428.

g. SEPARATE TRIAL.

329. Where several felonies are joined in the same indictment, the prosecutor will be compelled to elect on which he will proceed, but not so where misdemeanors are joined. *The State v. Kibby*, vii. 317.

330. Whether persons jointly indicted shall have separate trials, is a matter of discretion with the court, and unless the contrary appears, it will be presumed that such discretion was soundly exercised. *Fitzgerald v. The State*, xiv. 413.

331. Whether a prosecutor shall be compelled to elect on which count of an indictment he will proceed is a matter of discretion with the court; where the same offense is charged in different forms, the court may very properly refuse to compel an election. *The State v. Jackson*, xvii. 544. *The State v. Leonard*, xxii. 449.

h. INSTRUCTIONS.

aa. Generally.

332. It is error for the court, in a criminal cause, to instruct the jury that they are judges of both law and fact. *Hardy v. The State*, vii. 607.

333. Under the statute, (R. S. 1835, 493, § 4,) it is error for the court to instruct the jury that they "have a right and authority to return a general verdict of guilty, without assessing a punishment." *Foote v. The State*, vii. 502.

334. It is the duty of the court to instruct the jury that if, upon the whole case, they have a reasonable doubt of the guilt of the prisoner, they should acquit him, but a refusal to give this instruction is not sufficient cause to reverse the judgment, where the instructions given presented the whole case fairly before the jury. *Gardiner v. The State*, xiv. 97.

335. It is error for a court to comment upon the evidence in a criminal case, unless requested so to do by the prosecuting attorney and the defendant. *The State v. Dunn*, xviii. 419.

336. The court is not required to select each fact constituting an offense, and instruct the jury to acquit if they have a reasonable doubt of that fact. A general instruction to acquit the accused, if they have a reasonable doubt of his guilt on the whole case, is sufficient. *Ibid.*

337. It is the duty of the court to instruct the jury as to the law. If instructions are asked, the phraseology of which is objectionable, the court must give such instructions as the law of the case requires. *The State v. Matthews*, xx. 55.

338. Where the jury have a reasonable doubt of defendant's guilt, they should acquit; but a doubt, to authorize an acquittal, ought to be a substantial doubt of the defendant's guilt, and not a mere possibility of his innocence. *The State v. Nueslein*, xxv. 111.

339. It is error to instruct the jury that in order to find a verdict of guilty it is not necessary that they should be satisfied of the defendant's guilt to the exclusion of a reasonable doubt, but that if they believe, from the evidence, that

the defendant is guilty, they should so find, although they may entertain a reasonable doubt. The law presumes the innocence and not the guilt of the accused. *The State v. Fugate*, xxvii. 535.

bb. *In case of Murder.*

340. On a trial for murder, the jury, after the case was committed to them, came into court and inquired of the court whether they could find the defendant guilty of manslaughter only. The court told the jury that they were judges of the law and the facts, that they could find the verdict as they pleased, and that, when it was rendered, the court would pass upon its validity—*Held*, to be an instruction, and that, having been given orally, the judgment must be reversed. *Mallison v. The State*, vi. 399.

341. On the trial of two persons, jointly indicted for aiding and abetting a murder, an instruction to the jury, that "if the defendants, or either of them were present, &c., they must convict," will not be supposed to have misled them. *The State v. Taylor*, xxi. 477.

342. Although under the statute, (R. S. 1845, 344, §§ 1, 2,) the presumption from proof of the mere fact of killing, without proof of circumstances, is murder in the second degree, yet a case will not be reversed, for an instruction that it is murder, without stating the degree, another instruction being given correctly, stating what is necessary to constitute murder in the first degree. *The State v. Hays*, xxiii. 287.

343. Where the circumstances of a homicide show beyond all question that it was committed by lying in wait, it is not error to refrain from instructing the jury as to the law of murder in the first and second degrees. *The State v. Byrne*, xxiv. 151.

344. A., B. and C. were jointly indicted for murder, the first as principal in the first degree, the others as accessories. A. was acquitted; and upon the trial of B. and C., the court gave this instruction: "if the jury believe from the evidence, that A. wilfully shot and killed the deceased without premeditation, or without the intention to consummate by his act the death of the deceased, and that B. and C. were then and there present, aiding, abetting and assisting A. to do the aforesaid act, without premeditation or malice aforethought on their part, then you will find the defendants guilty of murder in the second degree, and assess their punishment," &c.—*Held*, that this instruction was misleading and erroneous. *The State v. Phillips*, xxiv. 475.

See SUPRA, 304.

i. VERDICT.

aa. *Generally.*

345. Where there is no misjoinder of counts in an indictment, and there is evidence to sustain any one of them, a general verdict is good. *Frasier v. The State*, v. 536.

346. A special verdict, in an indictment for libel, finding the defendant guilty of charging M. with being a "visionary, worthless speculator," is defective as not

finding malice, and also as varying from the allegations in the indictment, that the defendant charged M. with being the "most swindling and worthless speculator who ever brought ruin upon St. Louis." *Webber v. The State*, x. 4.

347. If the jury assess a punishment below the limit prescribed by law, for the offense of which the defendant is convicted, the court shall pronounce sentence, and render judgment according to the lowest limit prescribed by law in such cases. (R. S. 1845, 883, § 5.) *The State v. McQuaig*, xxii. 319.

348. In case of an indictment for a felony, it is error to receive a verdict of the jury in the absence of the defendant. He must be present, not only during the trial, but at the rendition of the verdict. *The State v. Buckner*, xxv. 167.

349. And the record must affirmatively show his presence. *The State v. Cross*, xxvii. 332. See *INFRA*, 415.

bb. *In Case of Murder.*

350. Where an indictment for murder contains two counts, one charging the offense to have been committed by killing with an instrument of wood, and the other by drowning: *Quære*, whether a general verdict of guilty is sustainable. *Mary v. The State*, v. 71.

351. Under an indictment for murder in the first degree, the defendant may be found guilty of manslaughter, both at common law and by the statute. (R. S. 1835, 214, § 14.) *EDWARDS J., dis. Watson v. The State*, v. 497. *Mallison v. The State*, vi. 399.

352. And so, a party indicted for murder may be found guilty of manslaughter in the third degree, in manner and form as charged in the indictment, although it contain no such separate charge. *Plummer v. The State*, vi. 231.

353. But upon the trial of an indictment for murder in the first degree, a verdict that the jury find the prisoner "guilty in manner and form as he stands charged in the indictment," is insufficient under the statute. (R. S. 1835, 493, § 1.) It should specify the degree of the offense. *McGee v. The State*, viii. 495. *The State v. Upton*, xx. 397.

See *SUPRA*, 313.

j. *NEW TRIAL.*

354. On the trial of an indictment, a motion for a new trial, or in arrest, will not be sustained on the ground that the court ordered one of the venire, who on his *voir dire* stated "that he had formed an opinion from having conversed with the defendant, but that he felt himself then in a state of mind to do justice between the parties," to stand aside. *Stoner v. The State*, iv. 368.

355. Where, in a criminal cause, the incompetency of a juror was known to the defendant before the jury was sworn, and the defendant made no objection to him then, the objection is waived, and cannot afterwards be made the ground for a new trial. *Lisle v. The State*, vi. 426.

356. The exclusion of evidence explaining the prisoner's flight, the record not showing that his flight had been proved by the State, or relied upon as any evidence of guilt, is not good ground for reversal. *The State v. Hays*, xxiii. 287.

357. A judgment will not be reversed because the court rejected evidence of

threats made by the deceased against the prisoner, the record not showing whether the threats were recent, or of long standing, and it appearing from all the evidence that the prisoner was the aggressor, and had sought the difficulty in which the deceased was killed. *Ibid.*

See *INFRA*, XX.

k. JUDGMENT.

358. Where persons indicted for a misdemeanor and found guilty, are named in the verdict, it is not necessary that they should also be named in the judgment rendered thereon; but a judgment against "the defendants" will be good. *Calloway v. The State*, i. 211.

359. In such a case, it is not necessary that the judgment should set forth the cause for which the fine is imposed, nor to whom it is to be paid. *Ibid.*

l. RECORD.

360. Where it does not appear from the record that the defendant, who had been found guilty of larceny, was in court during the trial, the judgment cannot be sustained. *The State v. Matthews*, xx. 55. See *SUPRA*, 349.

361. The record stated that the jury were composed of "twelve good and lawful men," and in setting down their names, one of them was repeated, making thirteen names in all—*Held*, that this was merely a clerical error. *The State v. Ball*, xxvii. 324.

362. In case of a conviction for an offense not capital, an omission to enter of record the *allocation*, or formal address of the judge to the prisoner, asking him if he has anything to say why sentence should not be pronounced against him, is not of itself fatal. *Ibid.*

IX. EVIDENCE.

a. DYING DECLARATIONS.

363. Upon a trial for murder, the declarations of the deceased are not admissible in evidence, unless they constitute a part of the *res gesta*, or are made *in articulo mortis*. *McMillen v. The State*, xiii. 30.

364. The dying declarations of the deceased made with regard to the circumstances which produced his death, are to be received with the same degree of credit as his testimony would be if examined on oath as a witness. *Green v. The State*, xiii. 382.

See *INFRA*, 437.

b. DECLARATION OF PRISONER.

365. Where the declarations of a prisoner are given in evidence, the jury may reject that part which is in his favor, and give credit to that which is against him. *Green v. The State*, xiii. 382.

C. CONFESSIONS.

366. The confessions of a prisoner, made under the influence of hope or fear, are inadmissible. *Hector v. The State*, ii. 166.

367. So the confessions of a defendant to an officer having charge of him, induced by the officer telling him that "he would not appear against him in court if he would confess, and tell him all about the act," and that "he had better confess and could give State's evidence," are not admissible in evidence against him. *Couley v. The State*, xii. 462.

368. But a mere statement to the accused, by the person having her in charge, that it will be better for her to tell the truth about the matter, does not bring a subsequent confession within this rule. *Hawkins v. The State*, vii. 190.

369. It is for the court to determine whether a confession is made with the requisite degree of freedom to render it admissible as evidence. *Hector v. The State*, ii. 166.

370. The rule, that a prisoner's confessions are to be taken altogether, does not mean that the jury should give the same degree of credence to every part; they may well disregard such parts as are inconsistent with reason or other proof. *Bower v. The State*, v. 364.

371. The confessions of a defendant, not made in open court, or on examination before a committing magistrate, but to an individual, uncorroborated by circumstances, and without proof, *aliunde*, that the crime has been committed, will not justify a conviction. *Robinson v. The State*, xii. 592.

See *INFRA*, 439; . . . MASTER AND SLAVE, 12.

D. ESCAPE.

372. On an indictment, evidence that the prisoner attempted to make his escape by using a false key, is admissible against him. *Fanning v. The State*, xiv. 386.

E. FLIGHT.

373. The interval between the perpetration of a homicide and the flight of the perpetrator may be so short that there can arise no well grounded apprehension of personal violence; in such case, evidence of excitement existing at the time of the arrest is incompetent, and may properly be ruled out, when offered to repel any presumption of guilt arising from the fact of flight. *The State v. Phillips*, xxiv. 475.

F. AFFIRMATIVE AND NEGATIVE.

374. Where one witness testifies that two men on horseback met, passed each other, and both wheeling, had an angry conversation, and another witness swears that he saw the two men meet and pass each other, and that they did not wheel nor converse together, and the Judge charges that where one witness testifies affirmatively and another negatively, the affirmative must prevail, such charge is inapplicable and erroneous. *The State v. Gates*, xx. 400.

g. MALICE.

375. Where several persons are jointly indicted for murder, upon a separate trial of one, a witness may testify as to the unfriendly state of feeling, at and before the time of committing the offense, between the deceased and those not upon trial, for the purpose of proving malice and general conspiracy by all. *McMillen v. The State*, xiii. 30.

h. INTRODUCTION AND EXCLUSION OF.

376. In a criminal case, it is error to admit illegal evidence, and afterwards exclude it by instructions. *The State v. Mix*, xv. 153. *The State v. Wolff*, xv. 168.

377. Where evidence is competent as against one of two defendants, and incompetent as against the other, the party as against whom it is incompetent should, on the failure of the court of its own motion to instruct the jury as to its application and effect, move the court so to instruct; if the court refuse to grant such motion, it is error; if no such motion be made, there is no error. *The State v. Phillips*, xxiv. 475.

i. VARIANCE.

378. The statute which provides that the jury may find the defendant guilty of any degree of the offense inferior to that charged in the indictment, (R. S. 1835, 214, § 14,) does not change the rule of the common law that the allegations and proofs must correspond. When the inferior degree of the offense is not included in the allegations of the indictment, but is of a totally dissimilar nature, the statute does not apply. *The State v. Shoemaker*, vii. 177.

j. GENERALLY.

379. Evidence that the offense proved before the jury is another and different offense from that which was proved before the grand jury who found the bill, is inadmissible. *Spratt v. The State*, viii. 247.

380. On an indictment, evidence of former indictments for the same offense, which have been dismissed or suspended, are not admissible. *Fanning v. The State*, xiv. 386.

k. IN THE VARIOUS CRIMES; SEE THEIR TITLES.

See PHYSICIAN.

X. DEPOSITIONS.

381. The testimony of a deceased witness, taken on the examination before the committing magistrate, is admissible in evidence on behalf of the defendant, on the trial of the cause before the traverse jury. *Garret v. The State*, vi. 1. And such a deposition when taken in the presence of the accused, may be

received in evidence on the part of the State upon proof of the death of such witness. *The State v. McO'Blenis*, xxiv. 402, RYLAND, J., *dis.* *The State v. Baker*, xxiv. 437, RYLAND, J., *dis.* *The State v. Houser*, xxvi. 431, RICHARDSON, J., *dis.* *The State v. Harman*, xxvii. 120.

382. And the provision of the constitution of this State, (Art. XIII, § 9,) "that in all criminal prosecutions the accused has the right to meet the witnesses against him face to face," does not render such evidence illegal. *The State v. McO'Blenis*, xxiv. 402, RYLAND, J., *dis.* *The State v. Baker*, xxiv. 437, RYLAND, J., *dis.* *The State v. Houser*, xxvi. 431, RICHARDSON, J. *dis.* *The State v. Harman*, xxvii. 120.

383. But such a deposition is not admissible where the witness resides beyond the jurisdiction of the court, unless his absence was procured by the defendant. *The State v. Houser*, xxvi. 431.

384. Where the defense, for the purpose of discrediting a witness for the prosecution, causes to be read certain portions of depositions of such witness taken before the coroner on the inquest and before the committing magistrate, the prosecution may then read the whole of such depositions. *The State v. Phillips*, xxiv. 475.

XL. WITNESS.

a. PRIVILEGE.

385. A witness is bound to testify on behalf of the State in a criminal prosecution, though he stands indicted for the same offense as the defendant, and declares that he cannot give testimony which might not lead to his own conviction, by disclosing persons who might testify against him. *The State v. Douglass*, i. 527.

386. In such a case, where the witness is required to testify, it is no ground for exception on the part of the defendant. The exemption from testifying is a personal privilege of the witness, which he alone can claim. *Ibid.*

387. It is the province of the court to determine whether a direct answer to the question propounded may tend to the crimination of the witness; but it is for the witness to judge whether his answer will disclose a fact constituting a material link in a chain of testimony sufficient for his conviction. *Ward v. The State*, ii. 120.

388. Where the transaction to which a witness is interrogated forms any part of the issue to be tried, he is obliged to give evidence, however strongly it may reflect on his character. *Clementine v. The State*, xiv. 112.

See SUPRA, 28.

b. CREDIBILITY.

389. Conviction of the offense of keeping a bawdy house goes to the credibility only, and not to the competency, of a witness. *Deer v. The State*, xiv. 348.

390. It is for the jury to determine what weight is to be given to the state-

ment of a witness. They can judge from his manner of giving testimony, from attendant circumstances, and from the probability of the fact to which he testifies whether it is true or not. *The State v. Anderson*, xix. 241.

C. HOW AFFECTED BY INTEREST.

aa. Co-Defendant.

391. Where several are jointly indicted, neither is admissible as a witness for the other, whether they are tried jointly or separately, being incompetent, not on the ground of interest, but of public policy. But where there is no evidence to criminate one, or he is made a defendant by mistake, or for the purpose of excluding his testimony, the court may direct his acquittal, that he may testify for the other. *The State v. Roberts*, xv. 28. *The State v. Edwards*, xix. 674.

392. A party who has been jointly indicted with the defendant, but in whose case a *nolle prosequi* has been entered, is a competent witness against him. *The State v. Clump*, xvi. 385.

393. A. and B. were jointly indicted for a felonious assault; A. was tried separately and convicted, and his punishment assessed at the payment of a fine; afterwards, upon the trial of B., A. was offered as a witness in his behalf—*Held*, that although it did not appear that he had paid the fine, he was a competent witness. *The State v. Stotts*, xxvi. 307.

bb. Accomplice.

394. An accomplice who is not put on trial with his associates may be a witness for them, although joined in the same indictment; and so if he has pleaded guilty, or been separately convicted, provided judgment has not been pronounced upon him for an offense which disqualifies him as a witness. *Garret v. The State*, vi. 1.

395. The question whether an accomplice may be a witness for others joined in the same indictment with him, when he is not put upon his trial with the others, discussed. *McMillen v. The State*, xiii. 30.

cc. Slave.

396. Upon the trial of an indictment against a free negress for leasing premises to be kept as a bawdy house, a slave, who cohabits with her as her husband, is a competent witness in her behalf. *Coleman v. The State*, xiv. 157.

D. RE-EXAMINATION.

397. The court may, in its discretion, permit witnesses to be recalled and examined, at any time before the jury retires, in criminal as well as civil cases, in order to supply testimony that has been omitted by inadvertance or mistake. *Freleigh v. The State*, viii. 606.

e. MILEAGE.

398. Where a witness, residing in another State, is compelled to enter into

recognizance to appear before the courts of this State, he will be allowed mileage from his place of residence. *Hutchins v. The State*, viii. 288.

See WITNESS.

XII. COSTS.

399. In criminal cases, where the fine, penalty or forfeiture, or any part thereof, accrues to the county, the fees for the services of officers and witnesses, in behalf of the defendant, must be paid out of the county treasury, where the defendant is acquitted or proves insolvent. (See R. S. 1825, 391, § 30.) *Ford v. Howard Circuit Court*, ii. 225.

400. Under the act of February 19, 1825, (R. S. 1825, 373,) a Sheriff cannot recover expenses incurred in executing a sentence of death. *Ford v. Howard Circuit Court*, iii. 309.

401. Under the statute, (R. S. 1835, 497, § 41,) the owner, and not the temporary master of a slave, convicted of arson, is the proper person against whom to tax the costs of conviction. *Reed v. Howard Circuit Court*, vi. 44.

402. Under the act of February 1, 1839, (Acts 1838-9, 93, § 2,) providing compensation for the transportation of convicts to the penitentiary, the guards are limited, in the allowance to them, to one dollar and seventy-five cents per day and eight cents per mile for travel, although there are several prisoners transported at the same time. *Ex parte Owen*, vii. 193.

403. Under the Acts of February 27, 1843, relating to costs in criminal cases, (Acts 1842-3, p. 31, § 13, p. 34,) a prosecutor is not liable for costs in any capital case, or in any case punishable by imprisonment in the penitentiary alone. *Ex parte Cain*, ix. 760.

404. Under the statute, (R. S. 1845, 887, § 30,) the State has a lien upon the property of the defendant for the payment of costs, from the time of his arrest or the indictment found, whichever first happens, which cannot be divested by any subsequent assignment, even to counsel to assist him in his defense. The arrest by an officer without a warrant is sufficient to attach such lien. *McKnight v. Spain*, xiii. 534.

405. Where an execution, in a criminal cause, issues for costs, without specifying on its face the amount, but contains an indorsement on the back of it, stating the amount and the sum due to each person entitled to the same, it is valid and sufficient. *Ibid.*

406. The person whose name is indorsed on an indictment as prosecutor, cannot be ruled to give security for costs. *NAPTON, J., dis. The State v. Bowling*, xiv. 508.

407. Judgment for costs cannot be remitted by a pardon of the offense, subsequent to the judgment. *The State v. McO'Brien*, xxi. 272.

408. Where several parties are jointly indicted, each party is liable for his own costs only. *Ibid.* See *INFRA*, 444.

409. An execution for costs cannot issue in a criminal case, while an appeal, with stay of proceedings, is pending. *Ibid.*

410. The provision of the statute of 1855 relating to costs, (p. 451, § 11,) is not applicable to cases in which persons had become prosecutors under the revision of 1845, p. 249, § 10. The undertaking of the prosecutor must be controlled by the statute in force when the liability was incurred. *The State v. Berry*, xxv. 355.

411. The State is liable for costs in a criminal prosecution against a slave only in case the slave is convicted of a capital offense and is executed; an escape of the slave from custody or his execution by a mob, either before or after conviction, is not sufficient to render the State liable for costs under the statute. (R. S. 1845, 250, § 13-16.) *Calhoun v. Buffington*, xxv. 443.

See LAWS, 33.

XIII. MISNOMER.

412. Where two names have the same original derivation, and are taken in common usage to be the same, though differing in sound, the use of one for the other is not a misnomer. *Wilkerson v. The State*, xiii. 91. *Sunday v. The State*, xiv. 417. *The State v. Hutson*, xv. 512.

413. The court has a right to say, as a matter of law, upon demurrer to a plea in abatement to an indictment, that "Owens D. Havelly," and "Owen D. Haverly," are *idem sonans*. SCOTT, J., *dis.*, holding that it was a question of fact for the jury. *The State v. Havelly*, xxi. 498.

414. "Blankenship" and "Blakenship" held *idem sonans*. SCOTT, J., *dis.* *The State v. Blankenship*, xxi. 504.

415. A verdict of a jury, finding James McBride guilty, Joseph McBride being the party indicted, will not support a judgment against Joseph. *The State v. McBride*, xix. 239.

416. Such a mistake cannot be rectified by amendment after the jury have separated. *Ibid.*

417. Where the indictment charged that the defendant assaulted "Silas Melville," with intent to kill, and the proof was that the name of the person assaulted was "Melvin"—*Held*, that this was such a variance as that the court should have directed an acquittal. *The State v. Curran*, xviii. 320.

See SUPRA, 257.

XIV. PRINCIPAL AND ACCESSORY.

418. An indictment against A. for inciting B. to a murder, which charges that he incited C. to do the act, is a mistake fatal to the indictment. *The State v. Houston*, xix. 211.

419. A joint indictment, which charges that the defendants "feloniously and wilfully did make an assault, with a certain knife of the length, &c., which they then and there in their right hand had and held, with the intent then and there him, the said C. H., with the knife aforesaid, wilfully and feloniously to kill, against," &c., is sufficient. *The State v. Dalton*, xxvii. 13.

420. A., B. and C. were jointly indicted for murder, the first as principal in the first degree, and the others as accessories. A. was put upon his trial and acquitted—*Held*, that as against B. and C., the question of the guilt or innocence of A. was still open, and that though A. was the actual perpetrator, the record of his acquittal was not evidence in favor of B. and C. *The State v. Phillips*, xxiv. 475.

421. All persons who were present at the time of committing an offense are principals, although only one perpetrated the act, provided they were confederates engaged in a common design, of which the offense charged was a part. *Green v. The State*, xiii. 382.

See SUPRA, 190, 394, 395.

XV. COURTS—TERMS OF.

422. A jury was empaneled to try a prisoner in the Boone Circuit Court. The trial was not concluded on Saturday evening, the last day of the regular term, and the judge directed the sheriff to adjourn the court to the following Monday, and to proclaim that on that day a special term of the court would be held, in continuance of the regular term, to finish the trial, which proclamation was made. The special term was accordingly held on Monday and the trial proceeded with, which on Tuesday resulted in a verdict of guilty, and sentence of death was pronounced against the prisoner—*Held*, that the special term was proper and legal, although a regular term of the Howard Circuit Court was to commence and be held by the same judge on the same Monday. WASH, J., *dis.* *Samuels v. The State*, iii. 68.

423. Under the statute, (R. S. 1835, 159, § 48,) an order from a circuit judge to the clerk, stating that a special term of the court will be held at a specified time, and directing a grand jury to be summoned, without stating the object of the term, is sufficient; and the statute embraces not only cases which have been passed upon by the grand jury, but also cases where a party has been charged with crime before a magistrate. *Mary v. The State*, v. 71.

XVI. APPEAL.

424. The State has no right of appeal in a criminal case, where the defendant has been acquitted of a felony by the verdict of a jury. (See R. S. 1835, 498, §§ 7, 9, 11–13. *The State v. Heatherly*, iv. 478. *The State v. Carroll*, vii. 286. *The State v. Shoemaker*, vii. 286.

425. Nor under the statute, (R. S. 1845, 889, § 10,) where judgment has been given for the defendant on demurrer to a plea to the indictment. *The State v. Rowe*, xxii. 328.

XVII. BILL OF EXCEPTIONS.

426. Under the revised statutes of 1825, (631, § 39,) a bill of exceptions did not lie in a criminal case. *The State v. Henry*, ii. 218. *Mitchell v. The State* iii. 283.

427. A bill of exceptions could not be allowed on the trial of any indictment previous to the passage of the act of 1835, (R. S. 1835, 491, § 23.) *Vaughn v. The State*, iv. 290.

XVIII. ERROR.

428. A writ of error lies in a capital case. *Mitchell v. The State*, iii. 283.

429. A writ of error does not lie to any other than a final judgment, and will not lie to the action of the court upon a special plea, or a motion to discharge in a criminal case. *The State v. Ruthven*, xix. 382.

430. Nor to a decision of the court overruling a motion to discharge the defendant from his recognizance, since it is not final. *Laporte v. The State*, vi. 208.

XIX. SCIRE FACIAS

431. Where a *scire facias* is issued on a forfeited recognizance in a criminal case, it is not necessary that the *scire facias* should contain an averment that an indictment had been found against the principal in the recognizance. *Snowden v. The State*, viii. 483.

432. A demurrer to a *scire facias* upon a forfeited recognizance, is not to be regarded as taken to what appears in the writ or in the recognizance, but to what appears of record. *The State v. Randolph*, xxii. 474.

XX. PRACTICE IN SUPREME COURT.

433. Where, in a criminal case, the defendant was convicted, and a motion for a new trial was overruled, the Supreme Court will reverse the judgment, and grant a new trial, if the weight of evidence is decidedly for the defendant. *The State v. Bird*, i. 585.

434. The Supreme Court will examine the validity of an indictment, whether a motion was made in arrest in the court below or not. (R. S. 1835, 499, § 11.) *Hamuel v. The State*, v. 260. *The State v. Vaughn*, xxvi. 29.

435. And an objection to an indictment may be made in the Supreme Court, although not made in the court below. *McWaters v. The State*, x. 167.

436. Judgment reversed and new trial ordered, because the verdict was not warranted by the evidence, and because the court gave instruction not founded upon any testimony in the case. *The State v. Packwood*, xxvi. 340.

437. Although it is the province of the judge, not that of the jury, to determine whether the dying declarations of the deceased are admissible, in cases where the death of the deceased is the foundation of the indictment, yet where the whole subject was left to the jury, under the direction of the court, and it was apparent that the accused had sustained no injury from the manner in which the declarations were introduced, the Supreme Court refused to reverse the judgment on account of such irregularity. *McLean v. The State*, viii. 153.

438. The Supreme Court will not reverse a judgment in a criminal case because irrelevant evidence was allowed to go to the jury, if it could not have been prejudicial to the accused. *The State v. Jennings*, xviii. 435.

439. The refusal of the court below to instruct the jury that evidence of verbal confessions is to be received with great caution, is not cause for reversing the judgment. *The State v. Clump*, xvi. 385.

440. This court will not reverse a judgment in a criminal case for error committed by the inferior court in quashing one count of an indictment, where the record shows that the defendant has been tried and acquitted on the remaining count or counts. *The State v. Leapfoot*, xix. 375.

441. Nor will it interfere with the punishment assessed by a jury, unless there has been an evident abuse of power. *The State v. Bean*, xxi. 269.

442. The fact that the attorney general of the State, without the direction of the governor, assisted in a criminal case at the request of the circuit attorney, with the leave of the court, although not required to disclose whether he did so in his official capacity, or received a fee therefor, is not ground for a reversal. *The State v. Hays*, xxiii. 287.

443. The St. Louis Criminal Court, in the case of an appeal from the city recorder, the cause being called for trial and the defendant not answering, on motion of the city attorney affirmed the judgment—*Held*, that this court will not interfere with the discretion of the Criminal Court in refusing to set aside the affirmance, the ground urged being that at the time the case was called, the defendant was necessarily absent for a few moments. *City of St. Louis v. Murphy*, xxiv. 41.

444. In re-taxing the costs in a case, if the fees are not legally chargeable, they will be disallowed; if the fee-bill on its face is illegal, it must be rejected; but if the charges are such as may have been legally incurred in the prosecution or defense of the action, the fee-bill will be taken to be, *prima facie*, correct, and the burden of showing its incorrectness is on him who objects to it. *The State v. McO'Blenis*, xxvii. 508. See SUPRA, 408.

See SUPRA, 238, 239, 354-357.

D A M A G E S .

I. PENALTIES AND LIQUIDATED DAMAGES.

II. RECOUPMENT.

III. IN VARIOUS CASES.

- a. ASSAULT.
- b. BILLS OF EXCHANGE AND PROMISSORY NOTES.
- c. CERTIFICATE OF DEPOSIT.
- d. MEASURE OF DAMAGES.
- e. CONTRACT FOR SALE OF LAND.
- f. COVENANTS RELATING TO LAND.
- g. EJECTMENT.

- h. INJUNCTION.
- i. NEGLIGENCE.
- j. SALE AND DELIVERY OF GOODS.
- k. TORT.
- l. TROVER.
- m. WARRANTY OF SOUNDNESS OF SLAVE.

IV. ASSESSMENT AND INQUIRY.—See PRACTICE.

I. PENALTIES AND LIQUIDATED DAMAGES.

1. M., one of the defendants, contracted with the county of Platte to cover their court house with tin in the best manner, for which he was to receive \$758. He, with the other defendants as securities, entered into bond for the faithful performance of the contract in the sum of \$1,570, "not as a penalty, but as liquidated damages"—*Held*, that the sum of \$1,570 was to be construed as a penalty, and not as liquidated damages. *Moore v. Platte County*, viii. 467.

II. RECOUPMENT.

2. The plaintiff built a boat hull for the defendant, and delivered it two months after the time limited in the contract between the parties. It was accepted, the defendant making no objections, and, in a suit for the price, *held*, that the defendant could not recoupe, against the plaintiff's claim, speculative damages, alleged to have accrued to him in the loss of profits in the use of the hull during the two months. *Taylor v. Maguire*, xii. 313. *Same case*, xiii. 517.

3. In an action on notes given for the purchase money of land bought by defendant of plaintiff, the defendant may recoupe the damages sustained by him, by reason of the false and fraudulent representations of the plaintiff, as to the quality and advantages of the land. *House v. Marshall*, xviii. 368.

4. So also in an action for the price of slaves sold. *Nelson v. Johnson*, xxv. 430.

5. In an action upon bonds given for the purchase money of land, the defendant may set up, by way of recoupment, damage for the removal and conversion of fixtures, without his knowledge or consent, after the contract of sale, and before a formal transfer of the land and the execution of the bonds. *Grand Lodge v. Knox*, xx. 433.

6. A purchaser who has been deceived by the fraudulent representations of the vendor, pending the negotiation, may, when sued by the vendor for the purchase money, at his option, set up his damages by way of recoupment, or he may bring a separate action against him for deceit. But in case the purchaser fails to recoupe, and the vendor recovers judgment for the whole sum, the purchaser has no right to an injunction to restrain the collection of the vendor's judgment, pending an action for the damages, on the ground of the vendor's insolvency. *Hall v. Clark*, xxi. 415.

III. IN VARIOUS CASES.

a. ASSAULT.

7. A party, in whipping a slave, unintentionally, but recklessly, inflicted blows upon her mistress. In an action by the mistress, it was *held* that the defendant's liability was not limited to the damages to her person, but that the jury might take into consideration her mental anguish and wounded feelings. *West v. Forrest*, xxii. 344.

b. BILLS OF EXCHANGE AND PROMISSORY NOTES.

8. Damages on a bill of exchange are not limited to the holder at its maturity. *Riggin v. Collier*, vi. 568.

9. Damages are not recoverable on a bill drawn or negotiated in this State, which is not expressed to be for value received. (See R. S. 1835, 98, § 7.) *Riggs v. City of St. Louis*, vii. 438.

10. So under the R. S. 1845, (173, § 7.) *Hallowell v. Page*, xxiv. 590.

11. The payee of a negotiable note, under the statute, (R. S. 1845, 173, §§ 8, 15,) is not entitled to recover four per cent. damages upon a protest; such damages are allowed only in case the note has been negotiated. *Bank of Missouri v. Wright*, x. 719. *Clark v. Schneider*, xvii. 295.

12. Indorsements are presumed to be for value, until the contrary appears. To entitle an indorsee to damages, it is not necessary that he should aver in his declaration that he is the holder for value. *Clark v. Schneider*, xvii. 295.

13. The liability of the drawer of a bill, in case of non-payment, is governed by the law of the place where it was drawn. *Price v. Page*, xxiv. 65. *Bouldin v. Page*, xxiv. 594. *Page v. Page*, xxiv. 595.

See BILLS EXCHANGE AND PROM. NOTES, 1.

c. CERTIFICATE OF DEPOSIT.

14. Damages are not recoverable on a dishonored certificate of deposit, under the statute, (R. S. 1845, 173, § 7.) *Sawyer v. Page*, xxiv. 595.

d. MEASURE OF DAMAGES.

15. P. purchased a horse of F., and agreed to pay for it in his own note for five dollars, and the note of a third party for seventy-five dollars—*Held*, in an action against P. for the non-delivery of the note of seventy-five dollars, that the nominal amount of the note was the measure of damages, and that evidence of the value of the horse was inadmissible. *Fenton v. Perkins*, iii. 23.

e. CONTRACT FOR SALE OF LAND.

16. On the rescission of contracts for the sale of lands, where the vendee has been in possession and the vendor has received the purchase money, the general rule is, to treat the use of the land as an equivalent for the use of the money, although this rule would not apply in the case of wild lands. *Shields v. Bogliolo*, vii. 134.

17. Where a contract of sale of land was rescinded, the vendee will be held liable, not as a lessee during his occupation of the premises, but only to the amount that he has been benefitted by the occupation of that portion of the land which really belonged to the vendor; and he should be allowed for all improvements, including those made on land by mistake, represented to have been conveyed to him. *Coffman v. Huck*, xix. 435. *Same case*, xxiv. 496.

f. COVENANTS RELATING TO LAND.

18. The measure of damages in an action for the breach of the covenant of seizin for life, is the purchase money and interest thereon. *Martin v. Long*, iii. 391. *Collins v. Clamorgan*, vi. 169. *Dunnica v. Sharp*, vii. 71. *Reese v. Smith*, xii. 344. *Tong v. Matthews*, xxiii. 437.

19. And where the covenantor has no title, nothing is recoverable by him from the covenantee for rents and profits while he was in possession. *Dunnica v. Sharp*, vii. 71.

20. And no allowance will be made to the vendee for improvements made by him. *Coffman v. Huck*, xix. 435. *Same case*, xxiv. 496.

21. K. covenanted to convey to H. certain real estate at an agreed price, at the same time, as a part of the consideration for the covenant, he received from H., but not indorsed by him, two acceptances, amounting to ten thousand eight hundred and seventy dollars, due eight months thereafter, but which were taken in the transaction for five thousand dollars. K. converted the acceptances to his own use, but refused to convey the estate according to his covenant—*Held*, that the measure of damages for a breach of the covenant, was the full nominal value of the acceptances without discount, and with the highest legal rate of interest from their maturity added. *Kyle v. Hoyle*, vi. 526.

22. Where a covenant of seizin is broken, and subsequently to the breach the covenantor acquires the title, (if there be in the deed a covenant of general warranty, by virtue of which, the covenantee will, by operation of law, be vested with the subsequently acquired title,) the damage is only nominal. *Reese v. Smith*, xii. 344.

23. In an action for a breach of covenant against incumbrances, the amount of damages depends upon what the covenantee has been compelled to pay to extinguish the incumbrance, and evidence as to the real consideration of the deed is not relevant to this issue. *Henderson v. Henderson*, xiii. 151.

24. The defendant covenanted to pay the plaintiff a specified sum per acre for a tract of land within specified boundaries, supposed to contain two hundred and forty acres, "more or less"—*Held*, that the defendant was bound to pay for the number of acres actually included in the specified boundaries, and no more. *Ayres v. Hayes*, xiii. 252.

25. The case of an entire failure of title in possession by the grantee under an adverse title, does not come within the rule limiting the recovery on the covenant of seizin to a nominal sum, until actual eviction. *Lawless v. Collier*, xix. 480.

26. If the grantee buy in the paramount title, the amount paid is the measure of damages upon the covenant of seizin. *Ibid*.

27. If the grantee assign the grantor's covenants as a part of the consideration

paid for a paramount title, the assignee, by a suit against the grantor on his covenant of seizin, can recover the entire purchase money paid him. *Ibid.*

28. The right of recovery of a subsequent grantee against the first grantor, must, it seems, be limited to his actual loss; but, it cannot exceed the liability of the first vendor to his immediate grantor. *Per* LEONARD, J. *Dickson v. Desire*, xxiii. 151.

See COVENANT, 19, 35, 39.

g. EJECTMENT.

29. A judgment for damages in an action of ejectment, although for a merely nominal sum, is a bar to a recovery in a subsequent suit for rents received prior to such judgment. *Stewart v. Dent*, xxiv. 111.

h. INJUNCTION.

30. Upon the dissolution of an injunction restraining the sale under a deed of trust, of property, effects, franchises, &c., belonging to a railroad company, it is erroneous for the court, without proof, to assess the damages at six per cent.; the damages should be commensurate with the actual injury, and may, if the circumstances warrant it, exceed ten per cent. upon the amount enjoined. *City of St. Louis v. Alexander*, xxiii. 483.

See DEED OF TRUST, 12.

i. NEGLIGENCE.

31. Where the plaintiff's property receives injury through the carelessness of the defendant in the construction of a sewer, no carelessness being imputable to the plaintiff, he may recover damages for the loss. *Reeves v. Larkin*, xix. 192.

j. SALE AND DELIVERY OF GOODS.

32. In an action for not receiving goods bargained and sold, the measure of damages is the difference between the contract price and the price which goods of a similar quality bear in the market at the time the tender was made, and the necessary charges attending the sale to other parties. *Whitmore v. Coats*, xiv. 9.

k. TORT.

33. In a case of tort, the injured party cannot recover for damages which, at a trifling expense, or by reasonable exertion, he might have prevented. *Douglass v. Stephens*, xviii. 362.

l. TROVER.

34. The measure of damages for the conversion of a slave, is the value with interest. *Polk v. Allen*, xix. 467.

35. In a suit for the conversion of a promissory note, its value will be taken, *prima facie*, to be the sum made payable on its face. *Menkens v. Menkens*, xxiii. 252.

See TROVER, X.

 III. WARRANTY OF SOUNDNESS OF SLAVE.

36. Where a slave that is warranted sound is slightly diseased, but comes to her death by the negligence and cruel treatment of the vendee, the measure of damages for a breach of the warranty is the injury occasioned by the disease, and not the full value of the slave. *Soper v. Breckenridge*, iv. 14.

37. In an action for a breach of warranty of soundness of a slave, the measure of damages is the difference between the value of the slave, if sound, and the value with the disease or unsoundness, *at the time of sale*. It is error to assume that the slave was not worth any thing at the time of the sale, because he afterwards died of the disease. *Stearns v. McCullough*, xviii. 411.

 IV. ASSESSMENT AND INQUIRY.—See PRACTICE, 189.

See ACTION, 48;....ADMINISTRATION, 41;....ASSUMPSIT, V;....ATTACHMENT, 30, 31;....BOATS AND VESSELS, 96;....BONDS, NOTES AND ACCOUNTS, 64, 73;....CHANCERY, 36, 39;....COMMON CARRIERS, 12;....CONTRACT, 42, 44, 47;....DEBT, 12;....DOWER, VI;....FORCIBLE ENTRY AND DETAINER, VI;....FRAUDULENT CONVEYANCES, VIII;....FREEDOM, III;....LIBEL AND SLANDER, VII;....NEW TRIAL, 62-65;....PLEADING, 130, 131;....PRACTICE, XI;....PRACTICE IN SUPREME COURT, 4, IX;....REPLEVIN, VI;....ROADS AND HIGHWAYS, 21;....SHERIFF, 4, 5;....TRESPASS, 8, VIII.

 DEBT.

I. ACTION.

II. PLEADINGS AND EVIDENCE.

 I. ACTION.

1. The action of debt for rent in arrear is an exception to the general rule, that where an action is founded on a deed, the deed itself must be declared on. *Garvey v. Dobyns*, viii. 213.

2. An action of debt will not lie for the recovery of a stipulated sum in specific property. *Snell v. Kirby*, iii. 21. *Knighton v. Tuftli*, xii. 531.

3. An action of debt will not lie for the non-performance of a contract under seal, if the damages are unliquidated, but it will lie on a covenant to pay a sum certain, even where secured by a penalty. *Little v. Mercer*, ix. 216.

See ADMINISTRATION, 17.

II. PLEADINGS AND EVIDENCE.

4. In a declaration in debt against G. and T. on a Kentucky judgment, the first count recited the recovery of a judgment against G., the issue of an execution thereon, and the taking a replevin bond executed by G. and T., which was returned and filed in the clerk's office, averring, that by the laws of Kentucky, it had the effect of a judgment, and as such was required to be kept in the clerk's office, and that the plaintiff could not therefor make profert thereof. The second count was like the first, making profert of a copy of the replevin bond. The third count was like the second, adding an averment that a *scire facias* was issued on the replevin bond, and that judgment of execution was rendered against both defendants—*Held, first*, that as the original judgment was against G. alone, a recovery could not be had upon it against G. and T. jointly—*second*, that a recovery could not be had on the judgment on the *scire facias*, because a judgment of execution and not of recovery—but, *third*, that a judgment might be had under the first and second counts, as counts on replevin bonds, with excuse for profert. *Webb v. Garner*, iv. 10.

5. In a declaration in debt, it is no error that the amount of the debt, as stated in the *queritur*, is less than the total of the amounts stated in the different counts. *Boyd v. Sargent*, i. 437.

6. The plea of *nil debet* to an action of debt on a speciality, is bad. *Boynton v. Reynolds*, iii. 79.

7. The breach assigned in an action of debt on a judgment in two counts, was, that the defendant had not paid the one thousand dollars above demanded, the sum demanded in the *queritur* of each, being one thousand dollars, but the judgment described seven hundred and sixty-two dollars and twenty cents—*Held*, that the assignment was good after verdict. *Pinkston v. Stone*, iii. 119.

8. It is error to strike out a plea of *non est factum*, to an action of debt on a bond, for want of an affidavit. *Bates v. Hinton*, iv. 78. *Snowden v. McDaniel*, vii. 313.

9. *Nil debet* is a bad plea to an action of debt, on a bond with a collateral condition. *Parks v. The State*, vii. 194. *Crigler v. Quarles*, x. 324.

10. In an action of debt by an assignee, where the pleas are *non est factum*, payment and set-off, the assignment is not put in issue, and need not be proved. *Ragland v. Ragland*, v. 54. *Davis v. Imboden*, x. 340.

11. Where judgment by default is rendered in an action of debt on a bond, the default is an admission of the debt as set forth in the declaration, and the plaintiff is not bound to produce the bond in evidence. *McCutchin v. Batterton*, i. 342.

12. In such a case, a judgment for nominal damages is erroneous; it should be for the debt and interest. *Ibid.*

DEED OF TRUST.

- I. CONSIDERATION OF THE NOTE SECURED.
- II. MIS-RECITAL IN DEED.
- III. RIGHTS AND POWERS OF TRUSTEE.
- IV. ASSIGNMENT OF.
- V. SALE.

- a. NOTICE.
 - b. MANNER OF SALE.
 - c. RIGHTS OF PURCHASER.
 - d. DAMAGES FOR ENJOINING SALE.
 - e. APPLICATION OF PROCEEDS OF SALE.
-

I. CONSIDERATION OF THE NOTE SECURED.

1. Fraud in the consideration of a promissory note, secured by a deed of trust, will not affect the title of a *bona fide* purchaser at a sale by the trustee under the deed. *Mathews v. Lecompte*, xxiv. 545.

II. MIS-RECITAL IN DEED.

2. One Bailey executed a deed of trust of certain real estate to secure the payment of an indebtedness, recited therein to be due "to Patrick H. and Sarah B. Scott, in the sum of about two thousand dollars, being the amount of principal and interest due upon a promissory note drawn by the said Bailey and indorsed by the said Patrick H. and Sarah B. Scott, and now past due and held by Mrs. Elizabeth Cabell, of Winchester, Va." It was intended by the parties to the deed of trust to secure the said P. H. and S. B. Scott against a liability upon a bond executed in favor of Mrs. Cabell by the Scotts, jointly with and as the sureties of Bailey—*Held*, that this mis-recital of the nature of the indebtedness was not such as to avoid the deed. *Scott v. Bailey*, xxiii. 140.

III. RIGHTS AND POWERS OF TRUSTEE.

3. Where trustees, empowered by a deed of trust to act separately, elect to act jointly, as by giving a joint notice of sale, one cannot afterwards act alone. *White v. Watkins*, xxiii. 423.

IV. ASSIGNMENT OF.

4. The transfer of a debt secured by deed of trust carries the security with it as an incident. If several promissory notes, secured by the same instrument, be assigned to different persons, the assignee of each note will, as a general rule,

acquire an equitable interest in the mortgage. But the interest which the assignee thus acquires in the security is purely equitable; it may be lost through his negligence, and it will be so lost where the rights of innocent purchasers intervene, who have been misled by misrepresentations or by his silence when it was his duty to speak. *Anderson v. Baumgartner*, xxvii. 80.

V. SALE.

a. NOTICE.

5. Where property was conveyed by deed to a trustee, to secure a debt due to a third party, with power in the trustee to sell the property, upon the debtor making default, and requiring one month's notice of the day of sale by advertisement, and the trustee advertised to sell on the 19th of October, and afterwards, with the consent of the parties interested, postponed the sale till the 31st of October, and gave notice, by advertisement, of the postponement, it was *held*, that the power was vested in the trustee by deed, and could not be changed except by deed; that the sale was invalid, because it was not advertised as required by the deed; and that the omission to advertise it one month before the day of sale was not cured by the consent of parties to have the property sold on the 31st of October. *Baldrige v. Walton*, i. 520.

6. Where a deed of trust required twenty days previous notice of the time and place of sale, it is not sufficient to have it published but once, where it is apparent that it was the intent of the parties that the publication should be continued up to the time of sale. *Stine v. Wilkson*, x. 75.

7. Thus, where a notice was published once in the "Evening Gazette," a daily newspaper published in St. Louis, and then transferred to the "Atlas," a weekly reprint of the "Evening Gazette," for circulation in the country, it was *held* insufficient. *Ibid.*

8. Trustees in a deed of trust, by advertisement dated December 7th, gave notice of a sale under the deed "on the 28th day of December next"—*Held*, that such notice could not mislead purchasers, and that a sale on the 28th of the same December was valid. *Gray v. Shaw*, xiv. 341.

b. MANNER OF SALE.

9. If the trustee in a deed of trust of land sell the same in lots, in the exercise of a reasonable discretion, it constitutes no objection to the validity of the sale. *Ibid.*

c. RIGHTS OF PURCHASER.

10. A purchaser at a trustee's sale, the terms of which are cash, who does not tender the money within a reasonable time, cannot afterwards demand a specific performance of the contract against the debtor who has paid the debt and costs, especially if he obtained his purchase through the inadvertance of the debtor. He who wants strict law, in such a case, must strictly comply with the law. *Heuer v. Rutkowski*, xviii. 216.

11. Default being made in the payment of the note secured by deed of trust on land, the trustee proceeded to advertise and sell the property, which was described in the deed as "a tract of eighty acres of land, situate," &c. On the day of sale, the description of the tract as set out in the deed and advertisement was read, and the land was offered for sale as a tract containing eighty acres, more or less. Bids were asked by the acre, for the whole tract. The plaintiff became the purchaser at \$8.50 per acre, and paid over to the trustee \$500, which amount was immediately passed to the *cestui que trust*. All the parties at the sale believed that the tract contained eighty acres, but it was subsequently surveyed and found to contain only twenty-three acres—*Held*, that the purchaser could not recover of the *cestui que trust* the excess over the twenty-three acres, but that he was entitled, on the ground of the mistake, to have the sale set aside. *Coons v. North*, xxvii. 73.

d. DAMAGES FOR ENJOINING SALE.

12. A. conveyed to B. a leasehold estate, consisting of certain land with a steam saw-mill thereon, in trust, to secure to C. the payment of two notes. After the first and before the second note matured, the property was advertised and sold, pursuant to the terms of the deed of trust, and D. became the purchaser. After the sale, D. tendered to B. the amount of the note, which had actually matured, together with a sum sufficient to pay the expenses of executing the trust, and a receipt from the assignees of A. for the balance of the purchase money, and demanded a conveyance of the property to him. B. refused to deliver a conveyance unless paid the amount of both notes, for which the purchase money was sufficient. Upon the maturity of the second note, B. again advertised the property for sale, but was enjoined from selling at the suit of D. The injunction was afterwards dissolved, but in the meantime the lease had been forfeited and the mill burned, so that the mortgaged interest was not worth the expense of a sale—*Held*, that D. was not entitled to a conveyance until he tendered the amount of both notes, though one was not due, and that, upon the dissolution of the injunction, damages should be assessed for the whole amount of both notes, with interest, the expense of advertising the second sale, and for counsel fees in resisting the injunction, although the maker of the note was still solvent. *Kennedy v. Hammond*, xvi. 341.

See DAMAGES, 30.

e. APPLICATION OF PROCEEDS OF SALE.

13. Where a debtor conveys property to a trustee, to secure specified debts, the balance, if any, after those debts are satisfied, should be appropriated in payment of such executions as have priority of lien upon the property. *Major v. Hill*, xiii. 247.

14. If there are three successive deeds of trust on real estate, and a sale is made under the second, leaving a surplus, that must be applied in payment of the third. The lien of the first continues. *Helweg v. Heitcamp*, xx. 569.

See CHANCERY, 80–88, 133.

D E M A N D .

I. WHAT IS SUFFICIENT.

II. WHEN NECESSARY.

III. WHEN NOT NECESSARY.

I. WHAT IS SUFFICIENT.

1. Where a special demand is necessary to give a right of action, the commencement of a suit is not a sufficient demand. *Pope v. Hays*, i. 450.

II. WHEN NECESSARY.

2. An agent who receives money or property for his principal, or a factor who sells and receives goods which remain unsold, is not liable until an account of sales is demanded, or a demand is made for the property. *Burton v. Collin*, iii. 315.

3. And a principal cannot maintain an action against an agent for money collected by him, until a demand is made, and whether a demand has been made is a question for the jury. It may be shown by circumstances. *Cockrill v. Kirkpatrick*, ix. 688.

4. A. assigned to B. money due him from the United States for services in the revolutionary war, and died, and C., his administrator, received money from the government on account of such services—*Held*, that B. could not recover the money from C. without having first made a demand. *Evans v. King*, xvi. 525.

5. If an administrator could maintain an action for the recovery of personal property held under a conveyance from his intestate, which was void as to creditors, a demand would first be necessary. *Brown v. Finley*, xviii. 375.

See *INFRA*, 14, 16.

See *BONDS, NOTES AND ACCOUNTS*, 84 ; . . . *SHERIFF*, 5 ; . . . *ST. LOUIS*, 1 ; . . . *TORT*, 2.

III. WHEN NOT NECESSARY.

6. Where one promised in writing to pay a certain sum to another, when certain moneys should come into his hands, no demand is necessary to enable the promisee to maintain an action on the promise ; proof that the promisor had received the moneys specified is sufficient to sustain the action. *Rector v. Hamtramck*, i. 565.

7. In an action of debt on a note made payable in specific articles at a particular time and place, no demand is necessary. *Cornelius v. M Donald*, ii. 55.

8. But if no place is named for the performance of the contract, a specific demand must be alleged and proved. *Martin v. Chauvin*, vii. 277.

9. Where the complaint is founded on the non-performance of a contract of affreightment for the delivery of goods, the plaintiff need not aver a demand. *Erskine v. St. Bt. Thames*, vi. 371.

10. Fraudulent representations, by the vendor, in regard to the property sold, will render void the contract of purchase; and the purchaser, in such a case, having refused to take the property, may recover back his advances, whether of money or specific property, without a demand before suit brought. *Malone v. Harris*, vi. 451.

11. Where in an action for the breach of a covenant for the conveyance of land, the covenantor is unable to make the conveyance in consequence of defect of title, it is not necessary for the covenantee to offer to rescind the contract, or to make a demand of the deed, before suit brought. *Dunnica v. Sharp*, vii. 71.

12. A, by deed, conveyed a tract of land to B. By a postscript thereto, A. bound himself to deliver possession on a specified day, and further agreed that in the event of a failure so to do, B. requesting it, he would pay all damages, &c., sustained in consequence of such failure—*Held*, that in ejectment brought by B., it was not necessary to show a request, as the last agreement did not affect the agreement to deliver possession. *Raymond v. Jewell*, ix. 20.

13. In trover, for property obtained by the defendant by an act of trespass, a demand is not necessary. *Matheny v. Johnson*, ix. 230.

14. But if a chattel be gratuitously left with a person, damages for conversion are not recoverable until demand made. *Polk v. Allen*, xix. 467.

15. In an action on a note payable "in whatever paper currency" is taken in a certain office on a specified day, no demand need be averred or proved. *Henshaw v. Liberty Ins. Co.*, ix. 333.

16. Where a conveyance is void, no demand is necessary previous to the institution of suit, but if it is voidable only, a demand should be made. *Tolson v. Garner*, xv. 494.

17. Where a natural guardian sells his ward's personal property illegally, suit may be brought against the vendee for the recovery thereof without demand being first made. *Mc Jarty v. Rountree*, xix. 345.

18. Money paid upon a contract which the other party fails to perform, may be recovered back as a part of the damages for the non-performance, without a demand. *Rollins v. Claybrook*, xxii. 405.

See ADMINISTRATION, 157;...COVENANT, 29;...REFLEVIN, II.;...SET-OFF, 34;...STRAYS, 6;...TROVER, VI.

DEPOSITIONS.

- I. COMMISSION—AND HEREIN OF THE STATUTE.
- II. NOTICE.
- III. TIME AND MANNER OF TAKING.
- IV. CERTIFICATE.

- V. OF THEIR INTRODUCTION ON TRIAL.
 VI. OF WHAT PERSONS ADMISSIBLE.
 VII. WHEN TAKEN FOR OTHER CAUSES, ISSUES OR PARTIES.

I. COMMISSION—AND HEREIN OF THE STATUTE.

1. By 1 Ter. L., 109, § 9, it is provided that depositions may be taken "before any Judge or Justice of the Peace of any of the United States or territories," upon a rule to be entered in court.

2. A *dedimus* directed to "any Judge or Justice of the Peace of the city of New Orleans," under that statute, is bad, and a deposition taken under such writ is inadmissible. *Ober v. Pratte*, i. 80.

3. By R. S. 1825, 324, § 2, a commission may issue to a judicial officer, "authorizing him to cause to come before him such person or persons as shall be named by either party, his attorney or agent."

4. A writ authorizing a judicial officer to cause to come before him "such persons as shall be named by the plaintiff, his agent or attorney," is not pursuant to that statute, and should be quashed on motion. *McLean v. Thorp*, iv. 256.

II. NOTICE.

5. A notice to take depositions on the 24th of June, 1828, between the hours of 8 A. M. and 6 P. M., and on the 25th, 26th, 27th and 28th of the same month and at the same hours, is bad; but such a notice confined to a day certain, and the intention of continuing from day to day expressed, is good. *Benton v. Craig*, ii. 198.

6. In determining the sufficiency of a notice to take depositions, the day on which the notice is given should be excluded, and the day fixed for taking the depositions should be included in computing the time. *Littleton v. Christy*, xi. 390. [See R. S. 1855, 1026, § 22, cl. 4.]

7. Notices to take depositions are to be served according to the act of 1845 relating to depositions, (R. S. 1845, 417, §§ 6-8,) and not according to the new code. (Acts 1848-9, 101, Art. XXIX.) *Miller v. McKenna*, xviii. 253.

III. TIME AND MANNER OF TAKING.

8. Where a notice to take depositions, fixed the time for taking the same between the hours of ten o'clock A. M. and six o'clock P. M., held that, depositions, appearing from the certificate of the officer taking the same, to have been taken between the hours of eight o'clock and six o'clock, should be excluded and suppressed. *Kean v. Newell*, i. 754.

9. A notice to take depositions on the 22d of the month will not authorize the taking of them, by adjournment from day to day, on the 26th, without having commenced the taking on the 22d. *Fox v. Carlisle*, iii. 197.

10. Depositions taken at the appointed time and place, and at a reasonable time of the day, are admissible, although the adverse party did not arrive till the other had finished taking the depositions. *Waddingham v. Gamble*, iv. 465.

11. Notice was given to take depositions on the 14th July, the taking to be continued from day to day, until completed. Two depositions were taken, which were commenced on the 14th and continued from day to day to the 16th, when they were completed—*Held*, that as the depositions, as far as anything appeared upon the face of them, might have been taken in an hour, something further must appear to justify the delay, as otherwise they would be suppressed. What was done each day should be stated. *Bracken v. March*, iv. 74.

12. Where a suit is commenced by attaching the defendant's property, the plaintiff may take depositions before summons served or publication completed. *Lewin v. Dille*, xvii. 64.

13. It is no objection to a deposition, that it appears by the caption that it was taken on a day subsequent to that fixed by the notice, if the Justice certifies that the taking was postponed by consent of parties. *Ibid*.

14. Where a party to a suit, through no want of diligence on his part, but through reliance on the promises of the opposing counsel and the notary before whom the deposition is taken is prevented from cross-examining the witness, the deposition should be suppressed. *Dannefelser v. Weigel*, xxvii. 45.

IV. CERTIFICATE.

15. The seal of a court affixed to the certificate of its clerk, to a deposition, is evidence that such court is a court of record, and it is not necessary that the certificate should state that fact. It lies upon the objecting party to rebut the presumption arising from the seal. *St. Bt. Thames v. Erskine*, vii. 213.

16. An uncertified deposition is rendered admissible, by the justice before whom it was taken deposing that it was regularly taken before him, and that the deponent is dead. *Wood v. St. Bt. Fleetwood*, xix. 529.

17. A certificate to a deposition that it was reduced to writing in the presence of the witness, and subscribed in the presence of the officer, is sufficient, although it omits to state that the deposition was reduced to writing in the presence of the officer. *Jolliffe v. Collins*, xxi. 338.

V. OF THEIR INTRODUCTION ON TRIAL.

18. Where, in the progress of a trial, depositions are offered in evidence and objected to on the ground that it did not appear that the witnesses were not in reach of process, the objection may be removed by other testimony. *Lepper v. Chilton*, vii. 221.

19. A deposition taken by a party to a suit, when filed, may be read in evidence by the other; and any objection to such deposition which the party, against whom the deposition was taken, would be required to make before trial,

must be made by the party taking it, if he object to its reading. *Greene v. Chickering*, x. 109.

20. A motion to exclude depositions, must specify the grounds of objection.—*Chapman v. Spicer*, x. 689.

21. Objections to the form of questions in depositions, must be made at the time the depositions are taken; it is too late to make them at the trial. *Glasgow v. Ridgeley*, xi. 34. *Walsh v. Agnew*, xii. 520.

22. The statement of a witness in his deposition, that he is “going to leave the State for Europe to-morrow,” will not authorize the reading of his deposition in evidence at the trial, three months afterwards, without some further proofs of his absence. *Gaul v. Wenger*, xix. 541.

23. The fact that depositions offered in evidence may contain incompetent and illegal evidence, will not justify the rejection of them altogether. The court should point out and exclude the inadmissible portions. *Hamilton v. Scull*, xxv. 165.

See PRACTICE, 147, 322; . . . PRACTICE IN SUPREME COURT, 43-44, 89.

VI. OF WHAT PERSONS ADMISSIBLE.

24. The deposition of a subscribing witness to a will may be taken under the general law concerning depositions. *Cawthorn v. Haynes*, xxiv. 236.

See WITNESS, 42.

VII. WHEN TAKEN FOR OTHER CAUSES, ISSUES OR PARTIES.

25. Depositions taken in a former suit between the same parties may be read in evidence, unless there be objections to them other than that they were taken in a former suit. *Tindall v. Johnson*, iv. 113.

26. And a copy of such deposition may be read upon proof of the loss of the original. *Finney v. St. Charles College*, xiii. 266.

27. But the party cannot read in evidence such a deposition, unless he has filed it in the suit in which he proposes to read it, or has given the opposite party notice that he intends to use it. *Samuel v. Withers*, xvi. 532.

28. It is admissible to read in a cause the deposition of one of the parties, taken in a cause wholly different, and between different parties. But the whole deposition must be read, though the omission to read a part may not be a good ground for reversal of judgment, if the party complaining of the omission was not prejudiced. *Kritzer v. Smith*, xxi. 296.

29. And the fact that a defendant is present in court during the trial, in obedience to a subpoena, ready to testify when called, will not render it improper to receive in evidence his deposition, taken in another cause in which he was a party; though not admissible as a deposition, it may, being signed by him, be received as a written admission. *Charleson v. Hunt*, xxvii. 34.

30. In case of a consolidation of two suits, depositions taken against a party

to one of the suits, and of the taking of which the party to the other suit had no notice, are inadmissible in evidence against the party not having notice. *Peery v. Moore*, xxiv. 285.

See CRIMINAL LAW, X.

DESCENTS AND DISTRIBUTIONS.

I. GENERALLY.

II. SPANISH LAW OF DESCENTS.

III. LAWS OF OTHER STATES.

IV. LEGITIMACY.

I. GENERALLY.

1. The Act of July 4, 1807, (1 Ter. L. 128, § 6,) so changed the law of descents and distributions, that lands in the Territory of Missouri did not descend to the brothers and sisters of half blood, as well as those of the whole blood. *Ravenscroft v. Shelby*, i. 694.

2. The Act of July 4, 1807, (1 Ter. L. 130, § 12,) provided: "There shall be no distinction in the distribution of any intestate's estate between kindred of the whole or half blood, unless where the inheritance came to the said person so seized by descent, demise or gift, of some one of his or her ancestors, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance"—*Held*, that, under this act, upon the death of one who had acquired an estate from one of his parents, the estate descended to him or her of the blood of him or her from whom it came. *Childress v. Cutter*, xvi. 24.

3. And that the words "of the blood" excluded only those who had none of the blood of the ancestor from whom the estate came, without reference to proportion or quantity; that all such as have none of the blood are entirely excluded, as where an estate came direct to the intestate from his father, brothers of the half-blood on the one side of the mother being in that case entirely excluded from the inheritance; that this exclusion is limited to those who are not of the blood of the immediately antecedent ancestor, as where an estate has passed by descent to two brothers, and upon the death of one brother his half has passed to the other, the intestate, the half brothers of such intestate on the side of the mother are not excluded from inheriting that portion of the estate that came to the intestate from his deceased brother. *Cutter v. Waddingham*, xxii. 206.

4. Under the third clause of § 1 of the statute relating to descents and distributions, (R. S. 1845, 421,) the grandfather, grandmother, uncles and aunts of the intestate, on the part of the parent from whom he inherited, are not preferred to his kindred in the same degree on the part of the other parent. *Peacock v. Smart*, xvii. 402.

II. SPANISH LAW OF DESCENTS.

5. By the Spanish law, which formerly prevailed in this State, if a person, who marries a second time, has had children of his or her prior marriage, he or she cannot dispose of the property given or bequeathed to him or her by the deceased spouse, or which came to him or her from any child of the first marriage, but it vests in the children of the first marriage, the spouse who married again taking only the usufruct of it during life. To this rule there was an exception in favor of women becoming widows before the age of twenty-five years. But a widow who claims the benefit of this exception, must prove herself within it; otherwise the case will be determined according to the general rule. *Childress v. Cutter*, xvi. 24.

6. By the Spanish law, if there were no descendants, the ascendants were preferred to collaterals. *Ibid.*

7. By the Spanish law of succession, which prevailed here prior to September 1st, 1807, brothers of the half blood would, in the case of an intestacy, be preferred in the succession to paternal aunts, although the intestate acquired the property from his father. The Spanish law paid no regard to the quantity of the blood of the intestate in the veins of one claiming to succeed to an estate, except in the case of brothers and sisters of the whole blood and their descendants who took before, and to the exclusion of the brothers and sisters of the half blood; nor did it pay any regard to the line from which the property came, except in the single instance of a deceased brother, leaving both paternal and maternal goods, and half brothers and sisters on both sides. *Cutter v. Waddingham*, xxii. 206.

8. By the Spanish law of second marriages, a widow, having become such when over the age of twenty-five years, on her second marriage forfeited to the children of the first marriage all the property that she may have acquired from her deceased husband by a lucrative title, either immediately or mediately through an intestate succession to a deceased child of the first marriage. Immediately upon the second marriage, the title to the property vested in the children, she, however, retaining the usufruct during her life. *Ibid.*

III. LAWS OF OTHER STATES.

9. By the law of Kentucky in 1830, a reversionary interest in slaves belonging to a woman at the time of her marriage vested immediately in her husband. *Sallee v. Chandler*, xxvi. 124.

10. A. died in the State of Virginia, possessed of certain slaves, leaving a widow and two children, a son and daughter. A portion of the slaves were allotted to the widow as dower, and remained in her possession until her death in 1816. The daughter married and died before her mother in 1812, leaving D. her husband, and several children. In 1816, after the death of the widow, proceedings for a partition of the dower slaves were instituted by the son against the children of his sister, in which D. appeared and acted as guardian *ad litem* for

his children, and an allotment having been made to D.'s children, he took possession of the slaves so allotted, and afterwards brought them to this State—*Held*, that D., by acting as guardian *ad litem*, did not become a party to the suit in such sense that he would be concluded by the judgment rendered in behalf of his children, nor would he be estopped thereby to controvert the title of his children; and that, by the law of Virginia, said slaves, upon the death of A. in the year 1784, descended to and vested in his children, subject to the widow's dower, and that the interest so vested in the daughter passed to D., her husband, and not to her children. *Terrill v. Boulware*, xxiv. 254.

IV. LEGITIMACY.

11. Where a man married in another State and there had issue, and subsequently removed to this State and married again, while his first wife was still living—*Held*, that the children of the second marriage were legitimate, and would inherit under § 8 of the statute relating to descents, (R. S. 1825, 328,) which provides that "the issue of all marriages deemed null in law or dissolved by divorce, shall nevertheless be legitimate;" and this provision is not controlled by § 1 of the act relating to divorce and alimony, (R. S. 1825, 329.) *WASH, J., dis. Lincecum v. Lincecum*, iii. 441.

12. A person cannot be bastardised by implication. *Per M'GIRK, J. Ibid.*

13. Under the Spanish law illegitimate children could not inherit the estate of their fathers or grandfathers, nor other relations descending from them. *Childress v. Cutter*, xvi. 24.

See ALIENS, 1, 2.

DEVISE AND LEGACY.

I. VALIDITY.

II. CONSTRUCTION.—INTEREST WHICH PASSES.

- a. LIFE ESTATE.
- b. ABSOLUTE.
- c. PROPERTY ACQUIRED AFTER WILL.
- d. SPECIAL CASES.
- e. EMBLEMENTS.

III. REMAINDER.

IV. LIMITATIONS.

V. INCREASE.

VI. PARTICULAR DEVISES.

VII. RESTRAINT OF MARRIAGE.

I. VALIDITY.

1. Before 1845 land could be devised by will executed according to the law of the place where it was made. The statute changing the law in this respect, (R. S. 1845, 1084, § 35,) is not retroactive in its operation. *Schulenberg v. Campbell*, xiv. 491.

2. A devise to a corporation will not be void on account of an immaterial variation in the name thereof, if there be enough to distinguish such corporation from all others. *St. Louis Hospital Association v. Williams*, xix. 609.

3. A court will not interfere to establish the validity of a charity in a will depending upon a contingency which has not arisen and may never arise. *The State v. Prewett*, xx. 165.

II. CONSTRUCTION.—INTEREST WHICH PASSES.

a. LIFE ESTATE.

4. An absolute power of disposition over property conferred by will, not controlled by any provision or limitation, amounts to an absolute gift of the property. But where the testator gave all his estate, both real and personal, to his wife during life, with power to dispose of it at her death, the wife acquires only a life estate in the property. The power of disposition given to the wife is a mere power, and, if not executed, the property, both real and personal, at her death descends to the heirs of the testator. *Ruby v. Barnett*, xii. 3.

5. Where an estate is devised to one, with a power of disposing of it absolutely for the benefit of the heir, no express estate for life being limited to the devisee, he takes an estate in fee upon trust, and the fee will pass by his conveyance. The heir cannot take advantage of the non-compliance with the directions of the will, but, as *cestui que trust*, must compel an observance of the trust by a suit in equity. *Norcum v. D'Ænch*, xvii. 98.

6. A testator in one section of his will gave his wife his "mansion house and plantation belonging thereto, during her natural and single life," and by a subsequent section gave to his said wife, in common with his children, "all the residue and remainder" of his estate, with power, in certain contingencies, to dispose of the same—*Held*, that the widow's power of disposal extended to the reversionary interest in the "mansion house and plantation." *Ibid*.

7. Where a will expressly gives a life estate only, declarations of the testator are inadmissible to prove an intention to give a power of disposal. *Gregory v. Cowgill*, xix. 415.

8. And words of mere implication will not convert it into a fee, unless such be the obvious general intent of the testator. *Ibid*.

9. Where the testator, by his will, gave his land to his wife, and provided that, upon her death, it should be divided among his four children, and after specific gifts to them he concluded his will with the express declaration that the bequests in it to his daughters "are made to them and the heirs of their bodies," it was *held*, that it was manifestly his intention to give the land to his wife for

her life only, with remainder to his children, to his sons in fee-simple, and to his daughters in fee-tail, but that by the statute, (R. S. 1845, 219, § 5,) the estate-tail of the daughters in the land was changed into a life estate only with remainder over in fee to their children. *Chiles v. Bartleson*, xxi. 344.

10. The court, in its discretion, may require a tenant for life of slaves or other property to give security that the property shall be forthcoming upon the termination of the life estate. *Roberts v. Stoner*, xviii. 481.

b. ABSOLUTE.

11. A will giving certain slaves to the devisee "and her heirs," vests an absolute estate in the devisee. *Trimble v. Hensley*, x. 309.

c. PROPERTY ACQUIRED AFTER WILL.

12. Under the statutes, (R. S. 1835, 617, §§ 1, 2,—R. S. 1845, 1078, §§ 1, 2,) as under the act of July 4, 1807, (1 Ter. L. 131, §§ 18, 19,) real property acquired after the date of a will passed to the devisee, where such appeared to be the intention of the testator. *Liggat v. Hart*, xxiii. 127.

d. SPECIAL CASES.

13. A bequest of a slave, "to be given into possession" of the legatee when he arrives at the age of twenty one, is a vested legacy, and entitles the legatee to the hire of the slave from the death of the testator. *Hamilton v. Lewis*, xiii. 184.

14. A testator directed the sale of his property, and the proceeds to be divided equally amongst his children and grand-children, "each grand-child drawing their equal proportion of what their ancestors would have drawn had they lived"—*Held*, that the grand-children took *per stirpes*. *Ibid*.

15. The testator died in Kentucky, having devised his real estate to his widow during life or widowhood. By legislation and judicial proceedings, had in that State, the widow was empowered to sell the land and invest the proceeds in lands in this State—*Held*, that such proceeds in her hands are to be regarded as in the nature of real estate. *Gates v. Hunter*, xiii. 511.

16. A bequest to the testator's wife "for her support, and the education of his daughter, of all the moneys which might be due him after his debts were paid, and all the rents and proceeds of his property of every description, for and during her life," conveys an estate to his wife for her life only. *Swearingen v. Taylor*, xiv. 391.

17. Under § 13 of the statute, relating to wills, (R. S. 1845, 1080,) where the testator speaks of a child known to be dead, as if she were alive, his object must have been that her children should enjoy the provision made for her. *Guitar v. Gordon*, xvii. 408.

18. Where a will, after the making of several specific bequests, proceeded thus: "I hereby direct, authorize and wish my executors to sell the whole of my real, personal and mixed property, the proceeds of which, together with what cash I may die possessed of, I wish disposed of in the following manner, viz:—"—*Held*, that it sufficiently appeared upon the face of the will that it was intended

to embrace and provide for the sale of all the real property owned by the testator at the time of his death. *Liggat v. Hart*, xxiii. 127.

e. EMBLEMENTS.

19. A devise of land will carry with it a crop growing thereon at the death of the testator, unless the testator otherwise directs. *Pratte v. Coffman*, xxvii. 424.

20. A testator devised a plantation to three grand-children, and then directed the sale by the executor of certain real estate, "also, all the perishable part of my estate, such as horses, mules, cattle of every description, &c., crops on hand, and all other personal property not herein otherwise disposed of," &c.—*Held*, that a crop growing on the plantation at the time of the testator's death, passed to the devisees, and not to the executor. *Ibid.* See *WILL*, III.

III. REMAINDER.

21. A testator devised real estate to his wife, "for and during her natural life, and after her death to descend to her children by him, equally, share and share alike"—*Held*, that this created a vested remainder in the children. *Jones v. Waters*, xvii. 587. See *SUPRA*, 9.

IV. LIMITATIONS.

²⁰⁰⁷ 22. A testator devised property to certain legatees, with a condition, that if either of such legatees should die before coming of age, or marriage, the portion of such legatee should be equally divided among the survivors—*Held*, that such limitation extends only to that contingency which might first happen, and that where one married and then died before coming of age, the limitation as to that estate would not apply. *Wells v. Wells*, x. 193.

23. A testator, in his will, used the following words: "I wish all my money placed out on interest, &c., so that the interest may support my children until they become of age, or marry"—*Held*, that whichever event should happen first to any of his children, the becoming of age, or marriage, then such child was entitled to his distributive share. *Overton v. Davy*, xx. 273.

V. INCREASE.

24. The increase of animals belongs to the person having a particular estate in them, and does not go to the remainder man. *Lewis v. Davis*, iii. 133.

25. Although slaves are personal property, yet they are regarded as of a peculiar and distinctive character, and would not be embraced in a general bequest of personal property, unless the intention of the testator were plain and manifest; hence it was *held*, that a clause in a will in these words: "My crop of grain, farming utensils, and household and kitchen furniture, and stock, all of which I want valued, and acted on according to law, after my affairs are settled; then, if

there is a residue, from hire of negroes, crop, &c., I wish to be given to E.," could not be construed to embrace a slave born after the death of the testator. *Clark v. Henry*, ix. 336.

VI. PARTICULAR DEVISES.

26. A will, besides giving certain specific legacies, contained the provision, "and after the death of my wife, my said daughter, M. J., to have \$800 worth of property," and a general residuary clause in favor of the wife. The executors, after paying the debts and specific legacies, delivered the residue, being of more than \$800 in value, to the wife—*Held*, that this discharged them from liability to M. J., the testator having intended that the wife should enjoy the property in specie during life; but that the property in the hands of purchasers from the wife, with notice, was liable, after her death, to the payment of the \$800; and that any portion or portions of the property in the hands of such purchasers, may be charged with the whole amount, if worth so much, though contribution might be forced, as between purchasers themselves. *Austin v. Watts*, xix. 293.

27. A will, after a devise to the wife of the testator of eighty acres of land, proceeded thus: "It is my will, that at the death of my wife, or at her marriage, or whenever she may, as my widow, voluntarily consent to it, that my land be sold, and that together all my other estate, to wit, &c., if not amicably and equitably divided, shall be sold at the time my daughter Elizabeth shall become of age, or to the age of twenty-one, as before mentioned, and shall be equally divided between my nine heirs, now next named," &c.—*Held*, upon an application for an order directing the executor to sell lands, other than the eighty acres devised to the widow, and distribute the proceeds among the parties entitled, that the land could not be sold, the widow still living, without her consent. *Bozarth v. Bozarth*, xxiv. 320.

28. A testator died, leaving six surviving children, and four grand-children, the children of two deceased daughters. By his will, he made certain specific devises and bequests to his widow, and to others, and for the payment of debts. To three of his grand-children (daughters of one of his deceased daughters,) he made a devise thus: "I also give and bequeath to my grand-daughters," (naming them,) "such portion of my landed estate as would have been their mother's, had she survived me, and I had died intestate, to be divided equally between them." To the other grand-child, he made this devise: "taking into consideration the present state of the remaining members of my family, I think it but just and equitable that my grand-daughter M. J. S., shall receive only one-half of such proportion of my landed estate as would have been her mother's, had she survived me, and I had died intestate"—*Held*, that the intestacy alluded to in these devises to his grand-children was not a total intestacy; that the testator had reference therein to that portion only of his estate which was not embraced in the specific devises made by him. *Smith v. Sweringen*, xxvi. 551.

29. A testator bequeathed all his estate, being entirely personal, to his wife, subject to the following provisions: "Provided, however, * * * * that

if my wife, the said Mary Ann, shall remain single during the minority of our children, then she shall, at their maturity, give to the said children who may then be living, their right, title and interest to, and in, for any property belonging to my estate, real, personal and mixed, reserving to herself the right of dower herein before stated. And, further, that the division of the said property then existing shall be made equal among my children, share and share to each alike, without distinction, preferment or feeling. And, further, that in order to secure to my said wife, Mary Ann, the furtherance of my will and testament, and to my children their right, title and interest hereby bequeathed to them out of my property, I hereby appoint and constitute as the executors of this," &c.—*Held*, that the widow did not become invested, by virtue of the will, with the power to dispose at pleasure of the property bequeathed; that those portions thereof to which the children would become ultimately entitled, she held as trustee for them; that, although she might pay over to each child, on its arriving at majority, its share of the property, yet she could not be compelled so to pay over; that such payment, if it could be enforced at all, must be in a court of equity. *Rose v. McHose*, xxvi. 590.

VII. RESTRAINT OF MARRIAGE.

30. A. devised to his son and daughter, in equal moieties, a tract of land, with the provision, that "if his said daughter should marry, or die," the land should belong exclusively to the son—*Held*, that the condition attached to the estate of the daughter was in restraint of marriage, and therefore void. *Williams v. Cowden*, xiii. 211.

31. A devise by a husband to his wife, "during her natural life or widowhood," is not against public policy as in restraint of marriage. An estate so devised is terminated by the marriage. *Walsh v. Mathews*, xi. 131. *Dumey v. Schæffler*, xxiv. 170, commenting upon and explaining, *Walsh v. Mathews*, xi. 131, and *Williams v. Cowden*, xiii. 211. *Dumey v. Sasse*, xxiv. 177. See *Commonwealth v. Hauffer*, x. *Penn. State R.* 350.

D O W E R .

- I. WHO ARE ENTITLED TO.
- II. WHEN ENTITLED.
- III. OF WHAT ESTATE.
- IV. PROCEEDINGS TO OBTAIN, AND ASSIGNMENT.
- V. HOW BARRED OR NOT.
 - a. BY MARRIAGE CONTRACT OR SETTLEMENT.
 - b. BY TESTAMENTARY PROVISION.

- c. BY CONVEYANCE.
- d. BY EXECUTION SALE.
- e. BY ADULTERY.
- f. BY ADMINISTRATION SALE.
- g. BY PARTITION SALE.

VI. VALUATION AND DAMAGES.

VII. ELECTION.

VIII. RELINQUISHMENT.

IX. SPANISH LAW.

I. WHO ARE ENTITLED TO.

1. Under the acts of January 25, 1817, (1 Ter. L., 509, § 1,) and January 11, 1822, (R. S. 1825, 326, § 1,) the widow of an alien is entitled to dower. *Stokes v. O'Fallon*, ii. 32.

2. Where a party induces a woman to marry him, by fraudulently concealing the fact that he has a wife living, his estate is liable, in assumpsit, for the value of the services of such woman while residing with him, but not as for the value of the dower. *Higgins v. Breen*, ix. 493.

II. WHEN ENTITLED.

3. A., prior to his marriage, conveyed certain lands in trust for such use and such person as he should afterwards appoint by deed or will, and, in default of and until such appointment, to the use of himself and heirs, and afterwards by his will devised all his real estate to his children by a former wife—*Held*, that his widow was dowable in the land in question, the provision in the will being considered a devise and not an appointment. *Link v. Edmondson*, xix. 487. See *Clere's case*, 6 Coke—4 Kent, 334-5.

4. Where real estate was bought by a partnership as partnership property, and afterwards conveyed in payment of a partnership debt, the widow of one of the partners, the firm being insolvent, is not entitled to dower. *Duhring v. Duhring*, xx. 174.

III. OF WHAT ESTATE.

5. Neither § 5, of the act of January 25, 1817, (1 Ter. L. 510,) nor the act of February 21, 1825, (R. S. 1825, 362,) repealed § 73 of the act of January 21, 1815, (1 Ter. L. 418,) giving to widows the right to remain in possession of the mansion of their deceased husband, and the plantation connected with it, until the assignment of dower. *Stokes v. McAllister*, ii. 163.

6. Ejectment is the appropriate remedy where the widow has been wrongfully dispossessed, the action for damages given by § 73 of act of 1815, (1 Ter. L. 418,) being merely cumulative. *Ibid.*

7. And this right of the widow is assignable. *Ibid.*

8. Where the husband dies, leaving children by a former wife, his widow, under

the statute of February 25, 1825. (R. S. 1825, 332, § 1.) can be endowed of only one-third interest in a slave during her natural life, although such slave came to the deceased husband through her, and he died without issue by her. *Griffith v. Walker*, iii. 191.

9. The widow's right of dower in slaves as fixed by the act of February 5, 1825, (R. S. 1825, 332, § 1,) is not modified by the act of February 19, 1825, (R. S. 1825, 790, § 1,) relating to wills. *Davis v. Davis*, v. 183.

10. If the husband die seized, the widow is entitled to be endowed of one-third of the land, according to the value thereof at the time the dower is assigned, as well against a purchaser under a sale by order of court, as against the heir; and, to recover damages from the death of her husband, no demand is necessary. *TOMPKINS, J., dis. Rankin v. Oliphant*, ix. 237.

11. The assignment of dower in leasehold estates under the statute is governed by the same rules which prevail in estates of inheritance. *Ibid.*

12. A widow takes her dower in her husband's estate, as against those whose rights to such estate originate at the same time with her right to dower, according to the law in force at the death of her husband, but as against those who have specific rights against such estate prior to the death of her husband, her right to dower will depend upon the law in force at the time such rights originated. *Kennerly v. Missouri Insurance Company*, xi. 204.

13. Under § 2 of the statute, (R. S. 1845, 430,) a widow with an only child is entitled to only one-half the slaves and other personal estate belonging to the husband at the time of his death, including advancements to the child in the husband's lifetime. *McReynolds v. Gentry*, xiv. 495.

14. By the statute, (R. S. 1835, 228, § 2,) the widow of a husband who died, leaving a child or children, was entitled, absolutely, to a share in the slaves and other personal property equal to the share of a child of such deceased husband, after the payment of his debts; and, upon her marriage of a second husband, he was entitled to such property, upon reducing it to possession during coverture. *Wall v. Coppedge*, xv. 448.

15. Under the statute, a widow is entitled to dower in no other personalty than that of which the husband was owner at the time of his death. *McLaughlin v. McLaughlin*, xvi. 242.

16. Under the act of Congress of March 3, 1843, (5 U. S. Stat., 619,) a widow is not entitled to dower in land to which her husband had a mere right of pre-emption which had not been consummated before his death. *Wells v. Moore* xvi. 478.

17. On the death of the husband, without children, the increase of a female slave that came to the husband by the wife, remaining undisposed of at his death, passes to the widow with the mother, under the statute, (R. S. 1845, 430, § 3.) *Herndon v. Herndon*, xxvii. 421. See ADMINISTRATION, XXI.

IV. PROCEEDINGS TO OBTAIN, AND ASSIGNMENT.

18. Where a widow is in possession of real estate, and rents it, she cannot have dower assigned in a proceeding against her tenant, although he refuse to

pay rent or quit possession. She must resort to the remedy of landlord against tenant. *Collin v. Wheldon*, i. 1.

19. Under the statute, (1 Ter. L. 187,) damages for deforcement of dower can be recovered under a petition praying for assignment of dower and damages for the deforcement; and an allegation in the petition that the defendant claimed title to the premises is not necessary. *Ibid*.

20. A petition for the assignment of dower, alleging that the husband died seized of the land, and that his estate was an estate of inheritance, sufficiently describes the character of the husband's title as a freehold of inheritance. *Lecompte v. Wash*, ix. 547.

21. Where the verdict, upon the issues joined on several pleas in bar to a petition for dower, found that the petitioner had left her husband, and lived in adultery with one L., but not since February 5, 1825, and did not find whether the petitioner had been reconciled to her husband—*Held*, that the court could not render judgment on the verdict, but must award a repleader. *Ibid*.

22. On a petition for dower, although the widow will not be held to strict proof of title in the husband, to make out a *prima facie* right, yet, upon a plea of *non seizin*, she must either show title in the husband, actual possession, or that the defendant holds under the husband. *Gentry v. Woodson*, x. 224.

23. The widow is neither tenant in common nor joint tenant with the heir or alienee. She has only a right in action until dower is assigned. *McClanahan v. Porter*, x. 746.

24. Where the County Court makes an order, allotting to a widow dower in slaves, without the notice required by statute to the executor, administrator, and other persons interested, (Acts 1836-7, 60,) it is void. No presumption that such notice has been given will arise where the record is silent. *Peake v. Redd*, xiv. 79.

25. The yearly value of the widow's dower in real estate not susceptible of division, where she accepts an annual sum in lieu thereof, under the statute, (R. S. 1845, 435, §§ 28, 29,) is its gross annual product, without the expenditure of money or labor upon it, after deducting charges to which it is subject, such as taxes and repairs. *Riley v. Clamorgan*, xv. 331.

V. HOW BARRED, OR NOT.

a. BY MARRIAGE CONTRACT OR SETTLEMENT.

26. A liberal construction will be put upon settlements made as a substitute for dower. An ante-nuptial contract for jointure, made by adults, though it fail to comply with the statute requisites, may be, in equity, a good bar to dower. *Logan v. Phillips*, xviii. 22.

27. Under the statute of 1845, (R. S. 1845, 432, §§ 12, 13,) a settlement, whether ante-nuptial or post-nuptial, does not operate as a jointure, unless expressed to be in bar of dower. *Perry v. Perryman*, xix. 469.

28. If the ante-nuptial provision for the wife does not consist of specific prop-

erty, but rests only upon the undertaking of the husband to pay or to restore money, or in things consumable to be restored in value, equity will see the provision executed before it deprives her of dower, at least, where the claim to dower is resisted by volunteers. *Quære*—Whether the same strictness would be held in the case of purchasers, *Johnson v. Johnson*, xxiii. 561.

b. BY TESTAMENTARY PROVISION.

29. A bequest of a slave to a widow does not, under the statute, (R. S. 1845, 431, § 10,) bar her dower in the real estate of the testator. *Halbert v. Halbert*, xix. 453.

c. BY CONVEYANCE.

30. A deed made by the deceased, with intent to defeat the widow's right of dower in slaves, can have no more effect than if its provisions were embodied in a will. Chancery will hold it void. *TOMPKINS, J., dis. Davis v. Davis*, v. 183. *Stone v. Stone*, xviii. 389.

d. BY EXECUTION SALE.

31. A widow whose husband died in 1840 has no right to dower in lands which had belonged to him, but had been sold under execution in 1827, on judgment rendered in 1824, the law then in force barring the widow of dower in land sold under execution. (See R. S. 1825, 332, § 1.) *Kennerly v. Missouri Ins. Co.*, xi. 204.

32. And a special execution issued on a judgment rendered in a suit against the husband alone, to foreclose an equity of redemption under a mortgage executed by the husband and wife, and accompanied by the wife's acknowledgment and relinquishment of dower, bars the wife's dower claimed under the act of 1825, (R. S. 1825, 332.) *Riddick v. Walsh*, xv. 519.

e. BY ADULTERY.

33. The statute of Westminster 2, making adultery and desertion by the wife a bar to dower, was not introduced into the territory of Missouri by the act of 1816, (1 Ter. L. 436,) adopting the common law. Its provisions were incorporated into the statute law of the State in 1825. (R. S. 1825, 334, § 7.) *Le-compte v. Wash*, ix. 547.

See SUPRA, 21.

f. BY ADMINISTRATION SALE.

34. Under the statute of 1825, (R. S. 1825, 332, § 1,) an administrator's sale for the payment of debts, bars the widow's dower in the property so disposed of. *Mount v. Valle*, xix. 621.

g. BY PARTITION SALE.

35. A widow's dower is divested by a sale in partition during coverture, although she is not joined with her husband as a party. *LEONARD, J., dis. Lee v. Lindell*, xxii. 202.

See INFRA, 48.

VI. VALUATION AND DAMAGES.

36. In estimating the damages in case of dower, the jury are to consider the value of the property, not merely up to the institution of suit, but up to the time of trial. *McClanahan v. Porter*, x. 746.

37. Where lands have been aliened during the life of the husband, the widow is entitled to dower in such lands, according to their value at the time of the alienation, and not according to the increased value of the land since the alienation, by means of the labor or expenditures of the alienee. And so of a purchaser under a sale on execution against the husband. *Ibid.*

38. Where lands, of which the husband died seized, descend to the heirs, the widow is entitled to dower according to their value at the time of the assignment, with damages for their detention from the death of the husband. *Ibid.*

39. The widow is entitled to damages, not as of any particular period, but as of the value of the property at the different periods in which she is deprived of her dower. In case of the heir from the death of her husband; in case of an alienee, from the time of her demand until the assignment of dower. *Ibid.*

40. Where lands aliened by the husband have depreciated in value from any cause, the widow is entitled to dower according to the value at the time of the assignment of dower, and not according to the value at the time of the alienation. *Ibid.*

41. So where they have appreciated in value from extrinsic causes not connected with the labor or expenditures of the alienee, the widow takes according to the value at the time of the assignment. *Ibid.*

42. Thus, although the widow gains nothing by the improvements of the alienee, she suffers loss by his waste or neglect, depreciating the value of the property. *Ibid.*

VII. ELECTION.

43. A widow is entitled to dower under the statute, (R. S. 1835, 228, § 1,) unless she elect to take under § 3 of the same act. Her right is absolute, until devested by election. *Hamilton v. O'Neil*, ix. 10.

44. And it is not necessary that a widow should file a renunciation as provided in § 10 of that act, to entitle her to be endowed under § 1, except in cases in which real estate has been devised to her. *Ibid.*

45. A widow must make her election of dower in six months, to entitle her to take under the statute. (R. S. 1835, 228, §§ 3, 5, 6.) *Kemp v. Holland*, x. 255.

46. A widow having elected to take the personal estate which came to her husband by means of the marriage, under the statute, (R. S. 1835, 228, § 3,) in lieu of dower, cannot have the real estate of her husband sold to pay his debts, so as to exempt the personal estate thus selected by her. *Chinn v. Stout*, x. 709.

47. Where a widow elected, under the statute, (R. S. 1845, 430, §§ 3, 6,) to take one-half of all the property belonging to her husband at the time of his death, absolutely—*Held*, that she could not claim, under this election, any right

to land disposed of by her husband before his death, even though more has been disposed of than ought to have been. *Hornsey v. Casey*, xxi. 545.

48. An election made by a widow under the statute, (R. S. 1845, 430, § 3,) to take one-half of the real and personal estate absolutely, will operate as a bar to dower under § 1 of the same act. *Scott, J., dis. Same case*, xxiii. 371.

49. In order to entitle a widow, under the statute, (R. S. 1845, 430, § 2,) to a share of slaves equal to the share of a child of the deceased husband, it is not necessary that she should make an election so to take. *Hayden v. Hayden*, xxiii. 398.

VIII. RELINQUISHMENT.

50. The right of the widow to \$200 worth of personal property, under the statute, (R. S. 1845, 77, § 30,) will pass by a deed of all her "right, title, and interest of dower in said estate," and that without reference to the question whether there is or is not a consideration for the assignment. *McFarland v. Baze*, xxiv. 156.

See HUSBAND AND WIFE, 84, 85.

IX. SPANISH LAW.

51. The Spanish law of community did not prevail in this State after the taking effect of the territorial act of July 4th, 1807. (1 Ter. L. 128, §§ 6, 15.) The dower given to the surviving wife, by that act, was in lieu of her interest under the Spanish law. *Riddick v. Walsh*, xv. 519.

52. Under the Spanish law, property, real and personal, acquired or purchased during marriage, enters into community, and at the death of the husband, one-half goes to the wife. *Picotte v. Cooley*, x. 312. [AFFIRMING *Lindell v. McNair*, iv. 380.]

See ESTOPPEL, 13; . . . HUSBAND AND WIFE, 43.

DRAMSHOPS.

I. LICENSE.

II. STATUTES.

III. PROCEEDINGS UNDER THE STATUTE.

- a. WHAT CONSTITUTES THE OFFENSE PROHIBITED.
- b. INDICTMENT.
- c. EVIDENCE.
- d. AGENT.
- e. DEFENSE.
- f. VARIANCE.

I. LICENSE.

1. A license to sell intoxicating liquors at one place is no defense to an indictment for selling at a different place, although the two bars are in adjoining buildings, and there is a communication between them. *The State v. Fredericks*, xvi. 382.

2. Under the amendatory act of 1851, (Acts 1850-1, 217, § 3,) all kinds of fermented liquors are intoxicating drinks within the meaning of the act of 1845, relating to groceries and dramshops, and no person can sell them without a license, even though they are of domestic manufacture, without making himself liable to indictment. *The State v. Lemp*, xvi. 389.

3. A city ordinance cannot abridge the rights of the holder of a previously issued tavern license, in regard to the sale of intoxicating liquors. *City of Hannibal v. Guyott*, xviii. 515.

4. A tavern license issued by the county court cannot authorize the grantee to sell liquor within the limits of an incorporated city, in violation of an ordinance previously passed in pursuance of a power conferred by the charter. *City of Independence v. Noland*, xxi. 394.

5. A license to sell liquor at one place in a specified block in the city of St. Louis, will not authorize a sale in any other block. *The State v. Hughes*, xxiv. 147.

6. Nor will a license justify a sale prior to its date. *Ibid.*

II. STATUTES.

7. Section 27 of the act relating to groceries and dramshops, as printed in the R. S. 1845, p. 545, held to be the correct exposition of that act, and to authorize the sale of spirituous liquors in quantities not less than one quart, at the distance of one mile from a town or village, and not to be drank at the place of sale. *Bledsoe v. The State*, x. 388.

8. The act of March 10th, 1849, (Acts 1848-9, 56,) which repealed the act of Feb. 16th, 1847, (Acts 1846-7, 59,) amendatory of the statute relating to "inns and taverns," (R. S. 1845, 583,) left all the provisions of the act of 1845 in full force, and thereafter the holder of a tavern license was permitted to sell intoxicating liquor in less quantity than one quart. The act of 1847 was not a repealing, but an amendatory act, and therefore the provision of the statute which provides that the repeal of a repealing act shall not revive the original, (R. S. 1845, 694, § 1,) does not apply. *City of Hannibal v. Guyott*, xviii. 515.

III. PROCEEDINGS UNDER THE STATUTE.

a. WHAT CONSTITUTES THE OFFENSE PROHIBITED.

9. A physician who administers intoxicating liquor in good faith as a medicine, upon his professional judgment, does not violate the statute, (R. S. 1845, 542, § 1). *The State v. Larrimore*, xix. 391. *Same case*, xx. 425.

b. INDICTMENT.

10. If an act which was not an indictable offense at common law, is prohibited by statute, and a particular method of proceeding is given by the statute, (1 Ter. L. 730, § 7,) that method must be pursued, and an indictment will not lie, unless authorized by the statute. *Journey v. The State*, i. 428.

11. So where the statute specifies a "bill plaint or information," (R. S. 1835, 292, § 8,) as the mode of recovering a fine or penalty, an indictment will not lie. *The State v. Corwin*, iv. 609.

12. Where, in an indictment under the act of 1825, (R. S. 1825, 660,) several distinct acts of selling, on the same occasion, were alleged in one count, it was held that the several acts of selling constituted but one offense, and that the indictment was good. *Storrs v. The State*, iii. 9.

13. In an indictment for keeping a grocery without a license, under the statute, (Acts 1840-1, 82, § 1,) it must be averred that the liquors sold were "not to be drank at the place of sale," in pursuance of the words of the statute. *The State v. Auberry*, vii. 304.

14. While the Act of March 18, 1835, (R. S. 1835, 315,) in relation to inns and taverns was in force, an indictment for dealing in wines, &c., under the Act of February 16, 1841, (Acts 1840-1, 81,) in relation to groceries and dramshops, should negative the existence of a license generally, or allege the absence of both a dramshop and an innkeeper's license, since, otherwise, it would not appear that the sale was not authorized by an innkeeper's license. *The State v. Brown*, viii. 210. *Neales v. The State*, x. 498.

15. And an indictment charging that the sale was without a license generally is good. *The State v. Wishon*, xv. 503.

16. So an indictment, charging the selling of one pint of whiskey, without a dramshop, tavern, grocer's, merchant's or any other kind of license, sufficiently negatives the existence of a license. *The State v. Owen*, xv. 506. *The State v. Hornbeak*, xv. 478. *The State v. Sutton*, xxv. 300.

17. So an indictment under the statute, (R. S. 1855, 683, § 1,) which charges that the defendant sold intoxicating liquors, to wit: one quart of whiskey, "without having any license for that purpose continuing in force during all that time authorizing him so to do," &c., sufficiently negatives any legal authority to sell intoxicating liquors. *The State v. Gregory*, xxvii. 231.

18. But an indictment charging that the defendant, who is not alleged to be a merchant, "did, &c., unlawfully sell to one F. intoxicating liquors, to wit: one gallon and one quart, for the price of ten cents, without having any kind of license for that purpose," is bad. *The State v. Runyan*, xxvi. 167. *The State v. Andrews*, xxvi. 169. *The State v. Chilton*, xxvi. 170.

19. An indictment alleging that the defendant sold intoxicating liquors to A., to wit: one quart of whiskey, to be drank at the place of sale, and allowed the same to be drank there, and that defendant had no license so to do, is substantially good. *The State v. Williamson*, xix. 384.

20. But an indictment charging the sale of one quart of whiskey, and suffering the same to be drank at the place of sale, without a grocer's, dramshop keeper's,

or innkeeper's license is bad. A tavern license ought to be negatived. *The State v. Haden*, xv. 447.

21. It is not necessary, in an indictment for selling liquor without a license, to allege in what character or capacity the defendant sold. It is sufficient to set out the sale without a license. *Austin v. The State*, x. 591.

22. Nor is it necessary to negative an exception not contained in the clause creating the offense. *The State v. Buford*, x. 703.

23. In an indictment for selling liquor without a license, the name of the person to whom sold, and the price, are immaterial. *The State v. Ladd*, xv. 430. *The State v. Miller*, xxiv. 532.

24. An indictment under the statute, (R. S. 1845, 405, § 34,) which charges the defendant with selling "an intoxicating liquor, to wit: one quart of whiskey, on Sunday," is sufficient, although it does not state that it was a "fermented or distilled liquor." *The State v. Williamson*, xxi. 496.

25. An indictment charging the defendant with selling "intoxicating liquors in a quantity than one quart, to wit: one-half pint of whiskey, of the value, &c., and one-half pint of brandy, of the value," &c., is sufficient. The word "less" having been omitted, the averment under the *videlicet* becomes material and must be proved as laid. *The State v. Arbogast*, xxiv. 363.

26. Since the Act of March 12, 1849, (Acts 1848-9, 54,) a person may be indicted for selling intoxicating liquors, as a dramshop keeper without a license, in any quantity less than ten gallons. *The State v. Slate*, xxiv. 530.

C. EVIDENCE.

27. In an indictment under the statute, (Acts 1838-9, 52, § 18,) for suffering liquor to be drank in the defendant's grocery, the fact that the defendant sold the liquor, and that the same was drank in his grocery, is evidence that the liquor was then drank with the permission of the defendant. *Casey v. The State*, vi. 646.

28. On the trial of a dramshop indictment, it is not proper for the State to ask a witness whether ale, porter and beer are intoxicating liquors within the meaning of the act. (See R. S. 1845, 545, § 28.) *The State v. Wittmar*, xii. 407.

29. An indictment which alleges that the defendant sold liquors "to persons to the grand jurors unknown," is supported by the testimony of a person who swears that the defendant sold liquor to him. *Isbell v. The State*, xiii. 86. *Hays v. The State*, xiii. 246. *The State v. Bryant*, xiv. 340.

30. Upon the trial of an indictment for selling liquor without a license, the burden of proof is on the defendant to show that he had a license. *Schmidt v. The State*, xiv. 137.

31. Where an indictment, under the statute, (R. S. 1845, 542, § 1,) charged the sale of one pint, proof of the sale of a half pint is sufficient to sustain the indictment. *The State v. Cooper*, xvi. 551.

32. But an indictment under the statute, (R. S. 1845, 542, § 2,) for selling without a license a quart of liquor, to be drank at the place of sale, is not sustained by proof of the sale of half a pint without license, the offense charged being against

the defendant as a grocer, and the proof being as against a dramshop keeper. *The State v. Weiss*, xxi. 493.

33. On the trial of a defendant for selling liquor in less quantity than one quart without a license, evidence that he had sold at a time different from that charged in the indictment is inadmissible for any purpose. *The State v. Fierline*, xix. 380.

34. Each act of selling liquor without a license is a distinct offense, for which the party may be prosecuted separately by indictment, or by different counts; when the defendant pleads *autrefois convict*, the onus is on him to sustain his plea; it is not sufficient for him to show that the evidence adduced against him would have supported the first indictment, because it would have been sustained by proof of any act of selling within twelve months before the finding thereof. *The State v. Andrews*, xxvii. 267.

d. AGENT.

35. A person indicted for selling liquor without a license, cannot excuse himself upon the ground that he was acting for another, and sold it as his agent. *Isbell v. The State*, xiii. 86. *Hays v. The State*, xiii. 246. *The State v. Bryant*, xiv. 340.

36. In such case, both the principal and the agent are liable. *Schmidt v. The State*, xiv. 137.

e. DEFENSE.

37. It is no defense to an indictment for selling intoxicating liquor without a license, that the County Court, acting under the statute, (Acts 1850-1, 216,) improperly refused to grant such license. *The State v. Jamison*, xxiii. 330.

f. VARIANCE.

38. In the trial of an indictment for selling liquor without license, which charges the sale to have been to persons to the jurors unknown, proof that the persons were known to the jury does not constitute a variance. *The State v. Ladd*, xv. 430.

See CRIMINAL LAW, 192-197; . . . LAWS, 35, 36, 66; . . . ST. LOUIS, V.

EJECTMENT.

I. TITLE.

II. ACTION.

- a. WHEN MAINTAINABLE.
- b. WHEN NOT MAINTAINABLE.
- c. PARTIES.
- d. DISMISSAL.
- e. PLEADING.
- f. EVIDENCE.
- g. POSSESSION.
- h. DEFENSE.
- i. JUDGMENT.

III. BETTERMENTS.

I. TITLE.

1. Exceptions to the maxim that the plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's. *Per* NAPTON, J. *Macklot v. Dubreuil*, ix. 473.

2. In ejectment, the plaintiff must show title in himself before the ouster laid in his declaration. *Buxton v. Carter*, xi. 481.

II. ACTION.

a. WHEN MAINTAINABLE.

3. A. conveyed a tract of land to B., Bishop of Louisiana, and C., D., E. and F., for purposes of charity, the *tenendum* clause being as follows: "To have and to hold the premises, with the appurtenances, to the said B., Bishop of Louisiana, and his successors in said Bishopric, and the said C., D., E. and F., and their successors," &c.—*Held*, that by this clause B. took a life estate, determinable on his ceasing to be Bishop, that the other grantees took merely life estates, and that A., the grantor, upon the removal of B. from his Bishopric, and the death of two of the grantees, might recover three-fifths of the premises in an action of ejectment. *Mullanphy v. Peterson*, i. 758.

4. A New Madrid certificate and survey thereon, if properly authenticated, will sustain the action of ejectment against a wrong doer. *Rector v. Welch*, i. 334.

5. A deed from A. and wife to B., for lands of the wife, is sufficient to enable B. to maintain ejectment, although such deed is not so acknowledged as to pass the title of the wife. *Bryan v. Wear*, iv. 106.

6. The certificate of the recorder of land titles, confirming a claim to a village lot in St. Charles, gives sufficient title to maintain ejectment, unless the person in possession shows a better title. *Janis v. Gurno*, iv. 458.

7. The statute which provides that "ejectment may be maintained in all cases where the plaintiff claims the possession of premises, against any person not having a better title thereto, under an entry with the register and receiver of any land office of the United States," &c., (R. S. 1835, 234, § 2,) simply places those entries upon the footing of other legal titles, and does not otherwise alter any of the established principles governing the action. *Hunter v. Hemphill*, vi. 106.

8. In actions of ejectment under the statute, (Acts 1838–9, 40,) a court of law has the same powers as a court of equity with reference to a title under a New Madrid location. *Mitchell v. Tucker*, x. 260.

9. A mortgagee may maintain an action of ejectment against the mortgagor, or those claiming under him. *Walcop v. McKinney*, x. 229.

10. Notice of location to the Surveyor General, and a survey of the land located, are sufficient to support an action of ejectment under the statute allowing such actions on New Madrid locations. (R. S. 1835, 234, § 2.) NAPTON, J., *dis.* *Cabunne v. Lindell*, xii. 184.

See LAWS, 37.

b. WHEN NOT MAINTAINABLE.

11. A. owned a tract of land in New Madrid county, which he conveyed to B. after it had been injured by earthquakes. After that conveyance, a New Madrid certificate was issued to "A., or his legal representatives," which certificate B. conveyed by deed to C., and C. to D., who located it and sold the land on which it was located, and the purchaser brought ejectment to recover the land on which it was located—*Held*, that, as there was no transfer of the certificate by A. to B., B. was not the legal representative of A. with respect to the certificate; that B., having purchased the land, was entitled in equity to have the certificate transferred to him, but that the legal right to locate it was in A., and therefore the action could not be maintained by the purchaser under B. *Hickman v. Gaw*, i. 499.

12. In 1799 a concession and order of survey were granted by the Lieutenant Governor of Upper Louisiana to one B., of a lot in the town of St. Louis, for the purpose of quarrying stone. No survey was ever made for the grantee under the concession—*Held*, that as there had been no survey, an action of ejectment could not be maintained under the act of January 23, 1816. (1 Ter. L. 465, § 3)—*Held*, also, that B. having quarried stone on said lot prior to December 20, 1803, is not sufficient possession to bring his claim within the Act of Congress of June 13, 1812, confirming town and village lots to the person in possession prior to December 20, 1803. *Jones, J., dis. Clark v. Brazeau*, i. 290.

13. The Lieutenant Governor of Upper Louisiana, in 1799, granted to P. Chouteau a quantity of land, and directed the Surveyor General to survey it when Chouteau should desire it, but reserving the right of the Intendent General to confirm the title—*Held*, that this concession did not effect a severance of the land from the King's domain until an actual survey was made, and was not such a grant as was contemplated by the statute in relation to ejectments. (R. S. 1835, 234, § 2.) *Ashley v. Cramer*, vii. 98.

14. Nor was the recommendation of this claim by the commissioners, under the act of Congress of July 9, 1832, (4 U. S. Stat., 565,) such a "confirmation made under the laws of the United States" as was intended by that statute. *Ibid.*

15. One will not be allowed to recover property under a deed which does not include within its description the property claimed, although the party under whom he claims, holding by a deed with a similar description of the premises, may have acquired title by adverse possession or in some other manner. *Menkins v. Blumenthal*, xix. 496.

16. Although the statute allows an action of ejectment to be maintained or defended upon an entry with the register and receiver, yet it is only where the adverse party has not a better title. A patent is a better legal title than such an entry. *Griffith v. Deerfelt*, xvii. 31. [See 13 *Pet. Rep.*, 436-498.]

17. An executor or administrator, as such, cannot maintain ejectment for lands of which the testator or intestate died seized. *Burdyné v. Mackey*, vii. 374.

18. Nor can an executor or administrator in such a case recover on the ground of title in himself, since that would be a variance from the declaration. *Ibid.*

19. Ejectment cannot be maintained against a minor upon the possession of his guardian. *Spitts v. Wells*, xviii. 468.

C. PARTIES.

20. Tenants in common cannot join in an action of ejectment. *Dube v. Smith*, i. 313. *Wathen v. English*, i. 746.

21. A wife cannot be joined with her husband as defendant in ejectment merely for the reason that she lived with him upon the premises. *Meegan v. Gunsollis*, xix. 417.

22. If a female defendant in an action of ejectment marries while the case is pending, the plaintiff is not bound to make the husband a party unless the latter applies to be made such. *Evans v. Greene*, xxi. 170.

D. DISMISSAL.

23. Where, in ejectment, the person from or through whom the defendant claims title to the premises has, on motion of the defendant, been made a co-defendant, the plaintiff is not entitled to dismiss the suit as to such co-defendant. *Hayden v. Stewart*, xxvii. 286.

E. PLEADING.

24. The act of 1825, regulating ejectments, requires the plaintiff to allege not only that he is entitled to the premises, but that he is legally entitled to the immediate possession of them. (R. S. 1825, 343.) *Jamison v. Smith*, iv. 202.

25. If a patent was obtained under such circumstances as would make the grantee in it a trustee for another, such circumstances must be set up in the answer to an action for the possession of the land with the same particularity that would be necessary in a bill in chancery. *Carman v. Johnson*, xx. 108.

See AMENDMENT, 19.

F. EVIDENCE.

26. The certificate of the Register of the United States Land Office, of a right of pre-emption, is *prima facie* evidence of title against a New Madrid certificate and survey. *Rector v. Welch*, i. 334.

27. In an action of ejectment by M., a patent certificate of confirmation to the legal representatives of M. is no evidence of title in M., nor will it be received in evidence in favor of M.'s legal representatives, without proof of their being such. *Matingly v. Hayden*, i. 439.

28. In an action of ejectment, where the plaintiff claims title under a patent from the United States, it is competent for the defendant to prove that the plaintiff was dead at the time the patent issued. *Collins v. Brannin*, i. 540.

29. The certificate of the Recorder of Land Titles (See 4 U. S. Stat., 66, § 3,) is *prima facie* evidence of title, and dispenses with the necessity of proof of the facts upon which the recorder was required to issue his certificate. *Macklot v. Dubreuil*, ix, 473.

30. And a person whose title is only naked possession cannot defend against

the certificate by showing that the facts upon which the Recorder issued the certificate did not exist, nor that the requisites of the statute were not complied with. [*Hunter v. Hemphill*, vi. 106, commented upon and explained.] *Ibid*.

31. In an action of ejectment for land sold under execution, brought against the defendant in the execution, the deed from the sheriff is valid, and may be read in evidence, although not recorded. *Smith v. Willing*, x. 394.

32. In an action of ejectment, it is competent for the plaintiff to prove that the defendant stated, at the time he executed the deed relied on by the plaintiff, that the land conveyed was the same on which the defendant lived. *Wilkerson v. Moulder*, xv. 609.

33. The plaintiff, in ejectment, offered in evidence, in support of his title, a transcript, filed in the Circuit Court, of a judgment rendered before a Justice. He then offered an execution issued from the Circuit Court, which purported to be a judgment of the Circuit Court, and a sheriff's deed, under this execution, and reciting it—*Held*, that the execution and sheriff's deed were properly excluded. *Blain v. Coppedge*, xvi. 495.

34. An action was brought against parties in occupancy of a sixteenth section of land. Their answers admitted the land in dispute to be a sixteenth section—*Held*, that there was no necessity for producing the original survey. *The State v. Fleming*, xix. 607.

35. Where, in ejectment, the defendant denies the co-tenancy alleged by plaintiff, no stronger evidence of an ouster is required than in a case where no co-tenancy exists. *Peterson v. Laik*, xxiv. 541.

See JUSTICE OF THE PEACE, 42.

g. POSSESSION.

36. The plaintiff and one D. both claimed title to the premises in question. The latter, after having been in possession several years and made some improvements, took a lease from the plaintiff determinable on ten days' notice, and occupied thereunder for a year, when he abandoned the premises and sold out his improvements to the defendant, who went into possession under a lease from D. —*Held*, in an action of ejectment, that the possession of the defendant was that of D. *Ayres v Draper*, xi. 548.

h. DEFENSE.

37. Proof, by the defendant in ejectment, of the confirmation of a Spanish grant to his grantor, without showing a location, will not authorize the instruction to the jury, that, if they believe the confirmation covered the land in dispute, they must find for the defendant. *Waddingham v. Gamble*, iv. 465.

38. Nor would it prove title out of the plaintiff to show that the land was, subsequently to a grant to him from the King of Spain, re-united to the king's domain by the Lieutenant Governor, the United States, who had all the title of the king, having confirmed the land to the plaintiff. *Ibid*.

39. The defendant in ejectment, under the statute, (R. S. 1835, 234, § 2,) as well as at common law, may defeat the plaintiff's action by showing title in a third person. *Gurno v. Janis*, vi. 330.

40. But where the plaintiff claims under a sheriff's deed, the defendant, who was the debtor in the execution, will not be permitted to set up an outstanding title in a third person in defense, or give it in evidence in mitigation of damages. (R. S. 1835, 235, § 11.—R. S. 1855, 692, § 13.) *Laughlin v. Stone*, v. 43.

41. In order that a defendant may defeat a recovery in ejectment, by showing an outstanding title in a third person, such outstanding title must be a present subsisting and operative title, and such an one as the owner could recover on if he were asserting it in an action. *McDonald v. Schneider*, xxvii. 405.

42. The plaintiff executed his bond to H., by which he agreed to convey the land in question to him upon the payment of a certain sum on a specified day ; but providing, also, that if the money was not paid on the day stated, the bond should be void. H., in the meantime, and until failure to pay, to have possession—*Held*, not sufficient to establish an outstanding title, without proof of the payment of the purchase money on the day specified. *Raymond v. Jewell*, ix. 20.

43. A pre-emption right need not be proved up, and a certificate thereof obtained, to enable the party to defend in an action of ejectment. *Allison v. Hunter*, ix. 741.

44. The title of a purchaser under an execution, relates back to the time at which the lien attached, and he will be entitled to all the rights of the execution defendant at such time. *Page v. Hill*, xi. 149.

45. And if at the time the lien attached, the defendant in the execution was in possession, as against the purchaser under execution, the title of the defendant cannot be disputed, nor can an outstanding title be set up to defeat his recovery of the possession. *Ibid*.

46. But where the defendant in the execution had no possession at the time the lien attached, and had conveyed the land by deed, although the same be not recorded, his vendee will be deemed as holding adversely to him, and may dispute his title, or set up an outstanding title to defeat a recovery by a purchaser under the execution, although, as against the title of such purchaser, the unrecorded deed is void. *Ibid*.

47. The title of a mortgagee, after forfeiture, is such an outstanding title as will prevent a recovery in ejectment. *Meyer v. Campbell*, xii. 603.

48. A *bona fide* entry from the United States will defend as well as maintain an action of ejectment. *Waller v. Von Phul*, xiv. 84.

49. An outstanding title, in order to constitute a bar in ejectment, must be a subsisting one at the commencement of the suit. *Norcum v. D'Ench*, xvii. 98.

50. A mortgage more than twenty years old is not such an outstanding title as will defeat an action of ejectment without any evidence in relation to the possession of the mortgaged premises, or of the present existence of the mortgage debt. *Moreau v. Detchemendy*, xviii. 522.

51. Where a defendant in ejectment relies in his answer upon a legal title, he cannot at the trial avail himself of an equitable defense. *Kennedy v. Daniels*, xx. 104.

52. Where the plaintiff in ejectment shows that whatever title the defendant may have had has passed by mesne conveyances to himself, it is not competent for the defendant to set up an outstanding title in a third person. *Mathews v. Lecompte*, xxiv. 545.

53. Under the practice act of 1849, an equitable defense may be made to an action of ejectment. *Hayden v. Stewart*, xxvii. 286.

See CORPORATION, 34.

i. JUDGMENT.

54. The plaintiff in ejectment may enter a remittitur to avoid a new trial. *McAllister v. Mullanphy*, iii. 38.

55. In an action of ejectment, although the plaintiff claims the whole, he may recover an undivided part. If he show himself entitled to an undivided interest, he can recover only such undivided interest; although the defendant should be a stranger to the plaintiff's title, he will hold the moiety recovered in common with the defendant. *Gray v. Givens*, xxvi. 291.

See ACTION, 46; . . . DEMAND, 12; . . . INTEREST, 8.

III. BETTERMENTS.

56. A tenant, who disclaims the title of his landlord, cannot, if defeated, have improvements. *McQueen v. Chouteau*, xx. 222.

See BOUNDARY AND DESCRIPTION, II; . . . DAMAGES, 29; . . . FORCIBLE ENTRY AND DETAINER, 14.

ELECTION.

1. The clerk and Justices who are required by the election law "to examine and cast up the votes given to each candidate," (R. S. 1845, 449, § 21,) have no right to go behind the certificates of the judges and clerks of the election. Any error in their certificate can be corrected only by the tribunal authorized by law to determine such election, when contested. *Mayo v. Freeland*, x. 629.

See LAWS, 31.

EMANCIPATION.

I. BY STATUTE.

II. BY WILL.

III. IN ANOTHER STATE.

I. BY STATUTE.

1. A slave can be emancipated only by an instrument of writing executed in accordance with the statute. (R. S. 1835, 587.) *Robert v. Melugen*, ix. 169.

II. BY WILL.

2. An instrument in the form of a will, under seal, attested by two witnesses, and acknowledged before the Circuit Court, but not probated, though inefficacious as a will, for want of probate, may yet operate as a valid act of emancipation, under the statute. (R. S. 1845, 1019, § 1.) *Schropshire v. Loudon*, xxiii. 393. See *INFRA*, 3.

III. IN ANOTHER STATE.

3. The power to emancipate slaves in another slaveholding State must be shown to exist by the laws of such State, or it will be presumed that no such power exists; and an authority to dispose of property by will does not include authority to emancipate a slave. *TOMPKINS, J., dis. Rennick v. Chloe*, vii. 197.

4. The attestation of two witnesses is not necessary to a deed of emancipation in this State, made in pursuance of the act of Maryland of 1752, when the emancipation is to take effect *in futuro*. *Paca v. Dutton*, iv. 371.

5. Under the laws of Kentucky, (in 1826,) where the common law prevailed, the mortgagor of a slave was the legal owner, and could emancipate her. *WASH, J., dis. Milly v. Smith*, ii. 171.

6. The act of the court in receiving and determining the proof, or in taking the acknowledgment of a deed of manumission, under the Kentucky statute of 1798, will be regarded as a judicial act. *Maria v. Atterberry*, ix. 365.

7. And where such deed is executed and acknowledged by attorney, the record need not show that the power of attorney was properly executed; but the order of the court on the execution of the deed is conclusive of the sufficiency of the execution of the power. *Ibid.*

See FRAUDULENT CONVEYANCES, 4, 5.

ERROR.

I. WHEN THE WRIT LIES.

- a. FROM FINAL JUDGMENT ONLY.
- b. ADMINISTRATION.
- c. ARREST OF JUDGMENT.
- d. CORAM NOBIS.
- e. EXECUTION.
- f. FORECLOSURE.
- g. NEW TRIAL—NON-SUIT—CONTINUANCE.
- h. RETURN OF SUMMONS.
- i. SUSPENDING ATTORNEY.
- j. TORT.

II. WHEN IT DOES NOT LIE.

- a. ADMINISTRATION.
- b. APPEAL FROM A JUSTICE.

- c. CHANGE OF VENUE.
- d. CIRCUIT COURT TO COUNTY COURT.
- e. DISMISSING A SUIT.
- f. DISSOLVING ATTACHMENT.
- g. IN FAVOR OF ONE NOT A PARTY.
- h. INJUNCTION.
- i. LOCATING COUNTY COURT.
- j. OVERRULING DEMURRER.
- k. QUOD PARTITIO FIAT.
- l. REFUSAL TO ISSUE MANDAMUS.
- m. REFUSAL TO REVERSE A SATISFIED JUDGMENT.
- n. ROADS AND HIGHWAYS.
- o. STRIKING CAUSE FROM DOCKET.
- p. SUPREME COURT TO COUNTY COURT.

III. WHAT THE WRIT EMBRACES.

IV. ISSUE AND RETURN.

V. ASSIGNMENT AND GROUNDS OF ERROR.

VI. JUDGMENT IN COURT OF ERROR.

I. WHEN THE WRIT LIES.

a. FROM FINAL JUDGMENT ONLY.

1. A writ of error lies only from judgments which are final. *Collier v. Wheldon*, i. 1. *Horr v. Knighton*, ix. 179.

b. ADMINISTRATION.

2. An order of the County Court requiring the administrator to "retain all the moneys of the estate which may come to his hands, subject to the order of the court, for the purpose of paying administrators and guardians, &c., in preference to other demands," is a final judgment upon which a writ of error lies. *Gamble v. Hamilton*, vii. 469.

c. ARREST OF JUDGMENT.

3. The arrest of a judgment is a final decision, and a writ of error lies from it. (R. S. 1825, 633, § 45). *The State v. Foster*, ii. 210.

d. CORAM NOBIS.

4. If a slave be committed and sentenced to the penitentiary, such fact not appearing in the record, it is an error of fact, and may be corrected by the court in which the judgment was rendered, on a writ of error *coram nobis*. *Ex parte Toney*, xi. 661.

5. The statute has fixed no limitation to writs of error *coram nobis*, the writs barred by it are those only which are brought to correct errors of law. *Powell v. Gott*, xiii. 458.

e. EXECUTION.

6. A writ of error will lie on the decision of a motion to require the sheriff to pay over money in satisfaction of an execution. *Wise v. Darby*, ix. 130.

f. FORECLOSURE.

7. A writ of error lies to a judgment rendered in proceedings to foreclose a mortgage. *Carr v. Holbrook*, i. 240.

g. NEW TRIAL—NON-SUIT—CONTINUANCE.

8. A writ of error lies on a judgment of the court overruling a motion to set aside a non-suit; improperly setting aside a non-suit; improperly granting or refusing a new trial; or improperly refusing a continuance. (Court Mo. Art. V. § 3—R. S. 1825, 633, § 45.) *English v. Mullanphy*, i. 780. *Collins v. Bowmer*, ii. 195. *Johnson v. Strader*, iii. 359.

9. But not from a judgment of non-suit, or on a judgment granting a new trial, until the cause is finally disposed of in the court below. *Martin v. Hays*, v. 62. *Howell v. Pitman*, v. 246. *Emmerson v. Harriet*, xi. 413. *Emmerson v. Dred Scott*, xi. 413.

10. The party must move to set aside such judgment, and except to the judgment of the court overruling the motion. *Atkinson v. Lane*, vii. 403.

11. The plaintiff recovered a verdict for \$470. On motion of the defendant a new trial was granted, and a verdict of \$60 returned on the second trial, whereupon the plaintiff moved for judgment on the first verdict, on the ground that the new trial was improperly granted—*Held*, that a writ of error will not lie on the judgment of the court granting a new trial, after a second trial is had. [*Johnson v. Strader*, iii. 355. *Hill v. Wilkins*, iv. 86. *Davis v. Davis*, viii. 56. *Samuel v. Morton*, viii. 633, REVIEWED.] *Helm v. Bassett*, ix. 51. *Keating v. Bradford*, xxv. 86.

h. RETURN OF SUMMONS.

12. A return of process is a part of the record upon which error will lie. Therefore where the return of the summons in a cause was signed by "A. B., Deputy Sheriff," such return being bad, the judgment was reversed on a writ of error prosecuted by defendants who had not appeared to the action. *Harriman v. The State*, i. 504.

i. SUSPENDING ATTORNEY.

13. A writ of error will lie to an order of a Circuit Court suspending an attorney from practice. *Strother v. The State*, i. 605.

j. TORT.

14. In an action of *tort* against two, where, after judgment, one of the defendants dies, a writ of error may be sued out by plaintiff against the surviving defendant, without making the representatives of the deceased defendant parties. *Potter v. Cratnot*, i. 368.

See APPEAL, 17;....BREACHES OF THE PEACE, 19;....CRIMINAL LAW, 48;....PROCESS, 21.

II. WHEN IT DOES NOT LIE.

a. ADMINISTRATION.

15. Where the plaintiff presented his claim in the County Court against an estate, but neglected to verify it by affidavit, as required by statute, (R. S. 1835, 56, § 9,) it is an irregularity that he cannot take advantage of. *Rankin v. Perry*, v. 501. *Perry v. Alford*, v. 503.

b. APPEAL FROM A JUSTICE.

16. A Case originating before a Justice, and taken by appeal to the Circuit Court, cannot be taken thence by appeal to the Supreme Court. (R. S. 1825, 632, § 43.) The proper mode of procedure is by writ of error. (R. S. 1825, 633, § 45.) *Clinton v. Dugal*, i. 761.

c. CHANGE OF VENUE.

17. A change of venue was ordered, without any application for such purpose, by a judge, on the ground that one of the defendants was related to him. Afterwards the judge to whose circuit the case was transferred, sent it back to the court from which it came, where it was docketed, to which the defendants excepted, but afterwards pleaded *nil debet*, and on trial judgment was given for the plaintiffs—*Held*, that even if a writ of error were a proper remedy, the defendants, by pleading in bar, had waived the error complained of; and that the proper course would have been to obtain a writ of prohibition. *Cupples v. Hood*, i. 497.

d. CIRCUIT COURT TO COUNTY COURT.

18. A writ of error will not lie from the Circuit to the County Court. *McGIRK, J., dis. Matson v. Dickerson*, iii. 339.

e. DISMISSING A SUIT.

19. An order by the court dismissing a cause, is not a judgment, in form or substance, from which a writ of error or an appeal will lie. *Miller v. Richardson*, i. 310.

f. DISSOLVING ATTACHMENT.

20. A writ of error does not lie from an order of the Circuit Court dissolving an attachment. *Lane v. Fellows*, i. 353.

g. IN FAVOR OF ONE NOT A PARTY.

21. One not a party in a cause in the court below, cannot take to the Supreme Court by writ of error. *Thompson v. Northcott*, i. 224.

h. INJUNCTION.

22. Under a statute which provided that every injunction to stay proceedings at law, when granted, shall operate as a release of all errors in the proceedings at law that are prayed to be enjoined," (R. S. 1825, 440, § 4)—*Held*,

that although such an injunction be dissolved on the ground that the party's remedy is at law, a plea for the granting of the injunction is a bar to a writ of error. *Chouteau v. Douchouquette*, i. 715. *Gonsolis v. Douchouquette*, i. 715.

i. LOCATING COUNTY SEAT.

23. A writ of error will not lie from an order of the County Court, appointing commissioners to locate a permanent seat of justice for the county. *Tetherow v. Grundy County Court*, ix. 117. *Johnson v. Clark County Court*, xx. 529.

24. If, in such case, the County Court proceed illegally, the only remedy is by an application to the Circuit Court for a mandamus. *Tetherow v. Grundy County Court*, ix. 117.

j. OVERRULING DEMURRER.

25. A writ of error will not lie on the judgment of the court overruling a demurrer. A final judgment must be rendered on the demurrer. *Palmer v. Crane*, viii. 619. *Same case*, ix. 266.

k. QUOD PARTITIO FIAT.

26. The first judgment, *quod partitio fiat*, in an action of partition is interlocutory, and a writ of error will not lie therefrom. *Ivory v. Delore*, xxvi. 505.

l. REFUSAL TO ISSUE MANDAMUS.

27. A writ of error or an appeal, will not lie on a refusal of a Circuit Court to issue a mandamus to the County Court. *Shrever v. Livingston County*, ix. 195. *Ex parte Skaggs*, xix. 339.

m. REFUSAL TO REVERSE A SATISFIED JUDGMENT.

28. Where a plaintiff recovers a judgment and receives satisfaction of it, he cannot afterwards sue out a writ of error to reverse such judgment. *Cassell v. Fagin*, xi. 207.

n. ROADS AND HIGHWAYS.

29. The action of the County Court, refusing to receive a report presented by commissioners appointed by the general assembly to survey and mark out a State road, is not such a final judgment as will sustain a writ of error. *Platte County Court v. McFarland*, xii. 166.

o. STRIKING CAUSE FROM DOCKET.

30. An order of a Circuit Court striking a cause from the docket, is not a decision of the court, but a refusal to proceed; and a writ of error will not lie from it. The remedy of the party, if any, is by *mandamus*. *Astor v. Chambers*, i. 191.

p. SUPREME COURT TO COUNTY COURT.

31. A writ of error will not lie from the Supreme Court to a County Court. *Thompson v. Smith*, i. 404.

32. Section 3, Art. V of the Constitution of Missouri, does not authorize it. *Town v. Clerk*, ii. 26.

See APPEAL, 8 ; . . . CRIMINAL LAW, 429, 430 ; . . . LOCAL DECISIONS, 7 ; . . . MANDAMUS, 2.

III. WHAT THE WRIT EMBRACES.

33. Where, on leave to amend, an amended petition is filed in vacation and no other steps are taken in reference to it, and at the next term the cause is tried on "issue joined," on the first petition, and the plaintiff did not attempt to abandon that and substitute the amended petition, the latter will not on error be regarded as a part of the case by the Supreme Court. *Collier v. Wheldon*, i. 1.

IV. ISSUE AND RETURN.

34. Under the act of December 12, 1820, (1 Ter. L., 719, § 14,) a writ of error was sued out on the 2d day of October, and made returnable to the next term, which began on the 22d of the same month—*Held*, that it was issued within twenty days next preceding the term, and could not stand as a return to the second term, but must be dismissed. *Taylor v. M'Knight*, i. 120.

35. A writ of error will be dismissed where the names of the parties are not inserted, and no amendment of such writ will be allowed in the Supreme Court. *Fremon v. City of Carondelet*, xxv. 62.

V. ASSIGNMENT AND GROUNDS OF ERROR.

36. A judgment rendered by the Supreme Court against a defendant in error for want of joinder in error, was, on motion, set aside, and the Court held they were bound to look into the record and see if there was error. *March v. Howell*, i. 138.

37. Upon a writ of error sued out by one in his lifetime, errors cannot be assigned by his executor without the death of the party being suggested on the record. *Childers v. Goza*, i. 394.

38. It is not enough, to reverse a judgment, that the party shows there was error against him ; he must also show that the error was to his prejudice. *Belissime v. M'Coy*, i. 318.

39. It cannot be assigned for error that the court, sitting as a jury, gave an improper verdict. *Johnson v. Strader*, iii. 355.

40. If the Circuit Court improperly award execution, the party aggrieved thereby must move to set it aside before it can be assigned for error. *Posey v. Buckner*, iii. 604.

41. Nothing can be assigned for error in the Supreme Court which was not made the subject of exceptions in the court below, either at law or in chancery. *Swearingen v. Newman*, iv. 456. *Cook v. Davis*, iv. 622.

42. No ground of error will be considered in the Supreme Court which has not been assigned and relied upon in the court below. *Long v. Story*, xiii. 4.

43. Where a motion to strike out an answer is taken up and disposed of on the day it is filed, both parties being present and neither objecting, the action of the court cannot be assigned for error. *Cashman v. Anderson*, xxvi. 67.

44. After the plaintiff has obtained leave to amend his declaration, and before the amendment is made, it is error for the court to render judgment for the defendant on a demurrer to the declaration, filed after leave to amend was granted. The judgment should be *non prosequitur*. (1 Ter. L. 847, § 25.) *Cabanne v. Lavallee*, i. 394.

45. Where part of the counts in a declaration are demurred to, and part pleaded to, it is error to render a judgment for the defendant on the whole declaration, upon sustaining the demurrer, without passing upon the plea. *Boyd v. Sargent*, i. 437.

46. Where there is an issue of law raised by demurrer to a plea, and also an issue of fact raised by a plea, a general judgment on the demurrer, without disposing of the issue of fact raised by the plea, is erroneous. *The State v. Gaither*, i. 501.

47. Where, in an action on a promissory note, the issues of fact are submitted to the court, and it decides for the defendant, on the ground that the evidence was not sufficient to prove his handwriting, it was *held*, that the judgment was not, for that cause, erroneous. *Bank of Missouri v. McKnight*, i. 762.

48. If a demurrer by the defendant in an attachment case is not disposed of before judgment against him, it is error. *Posey v. Buckner*, iii. 604.

49. Where an immaterial issue is found for the defendant, it is error to overrule a motion, by the plaintiff, for judgment on a material issue. *Menard v. Wilkinson*, iii. 255.

50. Where two or more material issues are joined, it is error to omit finding on any one of them. *Jones v. Snedecor*, iii. 390. *Pratt v. Rogers*, v. 51.

51. But the finding may be in general terms, thus, "we, the jury, find for the plaintiff and assess his damages," &c. *Stout v. Calver*, vi. 254.

52. A judgment of *respondeat ouster* is the proper one where a demurrer to a plea in abatement is sustained, and it is error to give a general judgment of recovery in such a case. *Wilson v. Atwood*, iv. 366.

VI. JUDGMENT IN COURT OF ERROR.

53. In settling administrators' accounts, where an appeal is taken from the County Court to the Circuit Court, and the case is brought thence to the Supreme Court by writ of error, the Supreme Court will not re-examine the facts of the case, but will merely correct such errors in law as shall appear to have intervened in the Circuit Court. JONES, J., *dis.* *Chouteau v. Consoue*, i. 350.

54. Whatever may be taken advantage of in arrest of judgment, may be corrected by writ of error. *McGee v. The State*, viii. 495.

55. The Supreme Court will take cognizance of an erroneous judgment of an inferior court, although a motion to set aside such judgment was not made in the inferior court. *West v. Miles* ix. 167.

ESCHEATS.

1. The real estate of an alien escheats to the State at his death. *Farrar v. Dean*, xxiv. 16.

ESTOPPEL.

- I. IN PAIS.
- II. BY DEED.
- III. BY RECORD.
- IV. BY OTHER MATTERS.
- V. LANDLORD AND TENANT.
- VI. VENDOR AND PURCHASER.
- VII. COVENANT.
- VIII. MORTGAGOR AND MORTGAGEE.
- IX. CONCEALMENT.
- X. WILL.

I. IN PAIS.

1. To establish an estoppel *in pais* there must be, first, an admission inconsistent with the evidence proposed to be given, or the claim offered to be set up; second, action, by the other party, upon such admission; third, an injury to him, by allowing the admission to be disproved. *Taylor v. Zepp*, xiv. 482.

2. Thus, where the owners of contiguous lots mutually establish a boundary line, and build up to it, and use and occupy according to it for a period long enough to show their agreement and acquiescence, although less than the period which would be a bar under the statute of limitations, they, and those claiming under them, will be estopped from afterwards claiming a different boundary. [*Taylor v. Zepp*, xiv. 482, commented upon and affirmed.] *Blair v. Smith*, xvi. 273.

3. And this principle is not in contravention of the statute of frauds. *Ibid*.

4. Verbal admissions, or mere presence at a survey, cannot operate as an estoppel *in pais*. *Valle v. Clemens*, xviii. 486.

II. BY DEED.

5. Where the grantors in their deed, conveying certain land to P. P., bounded it, in part, thus, "eastwardly by lot of P. P., and on which he now lives," it was held, that this was an acknowledgment of P. P.'s title to the adjoining lot, and that the grantors were estopped by their deed from averring the contrary; and that the circumstance that the acknowledgment did not show the extent of P.

P.'s title, whether in fee or for a less estate, made no difference. *TOMPKINS, J., dis. Lajoie v. Primm*, iii. 529.

6. All the parties to a deed are estopped from denying the recitals therein. *Dickson v. Anderson*, ix. 155.

7. But the recital, in a deed, of the payment of the consideration, is, in the United States, held to be an exception to this rule. *Ibid.*

8. A party is not estopped by his declarations, nor by an admission by deed, except as to the parties and privies thereto, from claiming the true lines of his land. *Cottle v. Sydnor*, x. 763.

9. A recital in a deed operates as an estoppel on the same principle as that which makes the declarations of a grantor evidence. A recital is not competent to show title in the grantor. *Joeckel v. Easton*, xi. 118.

10. Where a judgment for the possession of land is rendered against one of several tenants in common, in behalf of one claiming by title adverse to that of the co-tenants, and a writ of possession is issued and placed in the hands of the proper officer—*Held*, that this amounts to such an ouster as will terminate the co-tenancy, and that the plaintiff will not be estopped by accepting a conveyance from the defendant from denying the title of the co-tenants of his grantor; nor will the acceptance of such deed be such a recognition of a title, recited therein to have been acquired by the grantor, as will amount to an estoppel. *Vasquez v. Ewing*, xxiv. 31.

See CONVEYANCES, 77, 80.

III. BY RECORD.

11. Where it appears by the record that the party appeared by his attorney, he is estopped from denying the fact of such appearance. *Ramsey v. Goodfellow*, vii. 594. *Weber v. Schmeisser*, vii. 600.

IV. BY OTHER MATTERS.

12. A party cannot pass a title by estoppel who has not the power to make a direct conveyance. *Dougal v. Fryer*, iii. 40.

13. Where a widow had title to land in her own right, the fact that dower therein was allotted to and accepted by her, under a mistake as to her rights, does not estop her or those claiming under her from asserting such rights. *Thompson v. Renoe*, xii. 157.

14. From the mere fact that A. has "suffered and permitted" B. "to use and control a slave as his own property," he is not thereby estopped from thereafter claiming the slave as his own, though the slave has been sold as the property of B. *McDermott v. Barnum*, xvi. 114.

15. Under the act of Congress of March 3, 1823, (3 U. S. Stat., 787,) the register and receiver, under the advice and direction of the school commissioners appointed by the State, located land in lieu of the sixteenth section, granted, by

the act of March 6, 1820, for the use of schools, and the land thus located was sold under a law of the State, on the petition of the inhabitants of the township, and the money applied to the benefit of schools in that township—*Held*, that the State and the inhabitants of the township were estopped from afterwards claiming the sixteenth section. *The State v. Dent*, xviii. 313.

16. The plaintiff allowed certain property of his to be in H. R.'s possession, and knowingly permitted him to hold it out to the world as belonging to himself. The property was seized and sold on execution by H. R.'s creditors—*Held*, that the allowance of plaintiff's claim to such property would be a fraud upon the creditors of H. R., and that he is estopped from asserting it. And it is not necessary that a knowledge of the design of H. R. to defraud his creditors be brought home to plaintiff. *McDermott v. Barnum*, xix. 204.

17. A town, consenting to, accepting and acting on a survey of its common as correct, will be estopped from afterwards claiming as common, land not included in the survey. *City of Carondelet v. McPherson*, xx. 192.

18. Where parties have been under disabilities so that their title to land, held adversely, has not been barred by the operation of the statute of limitations, their failure to object to the adverse occupation, and to the making of improvements, &c., will not estop them from setting up title. *Dessaunier v. Murphy*, xxii. 95.

See ADMINISTRATION, 68 ; . . . ASSIGNMENT, 45 ; . . . REPLEVIN, 37.

V. LANDLORD AND TENANT.

19. The provisions of the Act of March 18, 1835, (2 Ter. L. 501,) authorizing the sale of the St. Louis commons, are directory, and not conditions precedent to the right to exercise the powers therein granted; therefore, in an action on an indenture of lease of a portion of said commons, the lessee is estopped by his deed from denying that the preparatory steps contemplated by the act were complied with. *City of St. Louis v. Morton*, vi. 476.

VI. VENDOR AND PURCHASER.

20. A vendee may dispute the title of his vendor in an action of ejectment. His possession is adverse to that of his vendor, and he may set up the statute of limitations, in bar of an action founded on his vendor's title. *Macklot v. Dubreuil*, ix. 473. *Joeckel v. Easton*, xi. 118. *Blair v. Smith*, xvi. 273.

21. The vendee is not tenant under, but is an adverse claimant against his vendor, and may dispute his title, or set up against him or those claiming under him, an outstanding title. *Page v. Hill*, xi. 149.

22. In an action between two alienees under the same alienor, one of them is not estopped from showing an outstanding title adverse to that of his grantor. *Landes v. Perkins*, xii. 238.

23. A., who claimed the equitable title to land, brought a bill in chancery

against B., who held the legal title—*Held*, that B. might set up in defense a prior equity in C., and is not estopped from so doing by a written agreement of compromise between him and C., in which it is recited that “B. is satisfied he has an indefeasible title to the land, and C. acknowledges he has no just claim to it.” *Livermore v. Leonard*, xvi. 474.

24. Where a purchaser of land executes a deed of trust, with warranty of title, to secure to the vendor the payment of the purchase money, he is not estopped by his warranty to avail himself of any relief to which he would otherwise be entitled by virtue of the vendor's covenants to himself. *Connor v. Eddy*, xxv. 72.

VII. COVENANT.

25. A grantor's covenant for further assurance will not estop his heirs from asserting a title not derived from him, unless they have assets by descent equal to the value of the property at the time they acquired the title to it. *Chauvin v. Wagner*, xviii. 531.

26. They are merely liable in damages to the extent of the assets that have descended upon them. *Ibid*.

VIII. MORTGAGOR AND MORTGAGEE.

27. A mortgagor, and those claiming under him, are estopped from saying that no title was conveyed to the mortgagee. *Bailey v. Trustees Lincoln Academy*, xii. 174.

IX. CONCEALMENT.

28. Where a party who has a right to or interest in land conceals it, or disavows his claim, and encourages a purchaser to buy the property of a third party, who does accordingly buy, relying upon such representations and encouragement, he will hold against the party having such concealed right. *Huntsucker v. Clark*, xii. 333.

X. WILL.

29. A recital in a testatrix's will in these words, “wishing and intending, as far as in me lies, to place my several children on an equal footing as regards their worldly advancement, at the time of my dissolution, and forasmuch as my second son and child Henry has been sufficiently provided for and established in the world by the will of his uncle Cyprian, deceased, and placed in a better situation in a pecuniary point of view than I remain able to place the balance of my children,” is not a ratification of the devise of Cyprian to Henry, nor does it adopt such devise, nor are the heirs of the testatrix estopped from denying the

validity of the will of Cyprian, although it was in fact void, and the property thereby devised to the said Henry at the time owned by the testatrix. *Scott, J., dis. Clamorgan v. Lane*, ix. 442.

30. Where proceedings, under the statute, (R. S. 1845, 1083, § 30,) are instituted in the Circuit Court to invalidate a will, and vacate the probate thereof, the executor who obtained the probate of such will, and who, for aught that appears, is still acting under it, is estopped to move to dismiss such proceedings upon the ground that the contested paper had never been lawfully established as the will of the testator, in that the judge, before whom it was proved, had not power to take proof thereof in vacation. *Potter v. Adams*, xxiv. 159.

EVIDENCE.

I. COMPETENCY AND RELEVANCY OF EVIDENCE.

II. PRESUMPTIONS, AND WHAT EVIDENCE WILL REBUT THEM.

III. EVIDENCE IN REBUTTAL.

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- n. BY A WITNESS.

- o. BY OBLIGEE IN A BOND.
- p. BY AN ASSIGNOR OF A CHOSE IN ACTION.
- q. BY HEIR AND DEVISEE.
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VII. ADMISSIONS BY PLEADING.

- a. IN CHANCERY PRATICE.
- b. IN PRACTICE AT LAW.
- aa. By Demurrer.
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VIII. ONUS PROBANDI.

IX. EXAMINATION OF PARTIES.

X. EVIDENCE IN PARTICULAR CASES.

- a. EXECUTION OF INSTRUMENT SUED ON.
- b. PRIVILEGED COMMUNICATIONS.
- c. CHURCH REGISTRY.
- d. ACCOUNT AND ACCOUNT RENDERED.
- e. ACCOUNT BOOKS AND MEMORANDA.
- f. CHARACTER.
- g. MISTAKE.
- h. LEX NON SCRIPTA.
- i. HANDWRITING.
- j. DOCUMENTARY.
- k. NAME.

XI. INTRODUCTION AT TRIAL.

I. COMPETENCY AND RELEVANCY OF EVIDENCE.

1. The testimony of a witness to prove a survey made by himself, for the purpose of establishing the extent of a party's possession, is admissible, without producing a plat of the survey. *Perry v. Block*, i. 484.

2. An officer will not be presumed to have applied the public funds to his private purposes, and hence, as a general rule, in an action in which the official conduct of an officer is in question, his pecuniary embarrassments would not be competent evidence; but where it has been shown that those having the right to control his acts have permitted him to use such funds, his pecuniary embarrassments are competent as a link in the chain of evidence establishing the defense of the securities. [*Turner v. Belden*, ix. 787, commented upon.] *Nolley v. Callaway County Court*, xi. 447.

3. Where knowledge of a particular fact is sought to be brought home to a party, evidence of the general reputation and belief of its existence among his neighbors is admissible, as tending to show that he also had knowledge of it. *Benoist v. Darby*, xii. 196.

4. Where a party introduces the books of the opposite party in evidence for one purpose, the latter may use them for another. *Lewin v. Dille*, xvii. 64.

5. A., a blacksmith, exhibited for allowance against B.'s estate a blacksmithing account of five years' standing, amounting altogether, during that time, to

\$183,25, the balance claimed, after allowing credits, being \$97,25—*Held*, that in order to account for the non-production of the plaintiff's books, it might be shown that the books were kept by the plaintiff himself; that some of the particular items charged being proved, it was competent for the plaintiff to show that B. had all his blacksmithing done at plaintiff's shop; that B.'s farm was of a particular extent, and that he had thereon a particular number of horses and wagons, and testimony of a like character. *Fath v. Meyer*, xxvii. 568.

II. PRESUMPTIONS, AND WHAT EVIDENCE WILL REBUT THEM.

6. Absence beyond seas for seven years, without being heard from, is presumptive evidence of death. *Lajoie v. Primm*, iii. 529.

7. Long-continued uninterrupted possession of premises, (in this case, twenty-six years,) is evidence from which a deed may be presumed. *Newman v. Studley*, v. 291. *McNair v. Hunt*, v. 300.

8. The sending of slaves by the father, to the house of his daughter's husband, and permitting them to remain there until after the daughter's death, is evidence from which a gift of the slaves may be inferred. *Mulliken v. Greer*, v. 489. See *INFRA*, 11.

9. The refusal of the county treasurer to pay a warrant drawn upon the treasury, is presumed to be based upon the want of funds, since it is presumed that a public officer does his duty. But his declarations, assigning the want of funds as the reason for not paying, are not admissible. His declarations, assigning other reasons for his refusal, are admissible to rebut the presumption of want of funds. *Nolley v. Callaway County Court*, xi. 447.

10. A receipt in full of all demands raises a strong presumption that all previous dealings between the parties are adjusted, but may be rebutted by direct proof or strong circumstances. *Gibson v. Hanna*, xii. 162.

11. Where a father, upon the marriage of his son, delivers to him a slave, without any explanation at the time, of his intention, whether it is a gift or a loan, the presumption of law is, that it is a gift, and where the property thus delivered remains a considerable length of time in the possession of the son, it should require the clearest, most direct and uncontradictory evidence to rebut this presumption. [*NAPTON, J. and SCOTT, J., dis.*] See Reporter's note on page 37. *Martin v. Martin*, xiii. 36. See *SUPRA*, 8.

12. For some purposes, possession is *prima facie* evidence of a title in fee. *Crow v. Marshall*, xv. 499.

13. In the absence of positive knowledge, the courts of one State will presume that the common law of another State corresponds with that of their own. *Warren v. Lusk*, xvi. 102.

14. And judicial notice will not be taken of laws of a sister State at variance with the common law. *Houghtaling v. Ball*, xix. 84.

15. A deed of gift to a married woman will be presumed to be in the custody of her husband, until his death, and afterwards of his personal representatives. The statutory mode of compelling the production of papers, does not supersede

the common law mode of giving notice to produce and proving contents. *McLain v. Winchester*, xvii. 49.

16. It will be presumed that a member of a municipal corporation is aware of the by-laws and ordinances of the same. *Inhabitants of Palmyra v. Morton*, xxv. 593.

III. EVIDENCE IN REBUTTAL.

17. Evidence in disproof of facts relied upon by the other party, is admissible. *Davis v. Cooper*, vi. 148.

18. Rebutting evidence is that which directly weakens or impeaches that of the opposite party, and not that which is merely cumulative. *Craighead v. Wells*, xxi. 404.

19. Where a party's acts are given in evidence, he may, in rebuttal, show other acts which are a part of or connected with, and explanatory of those previously used against him. *Blair v. Marks*, xxvii. 579.

IV. JUDICIAL NOTICE.

a. OF WHAT THE COURTS WILL TAKE JUDICIAL NOTICE.

20. The courts of this State will judicially take notice of the laws of France and Spain which were in force in this State while a part of the Territory of those governments, but they will not take notice of the laws of Canada. The legality of slavery under the laws of Canada, is a question of fact for the jury. *Chouteau v. Pierre*, ix. 3. *Ott v. Soulard*, ix. 573.

21. So of the fact that certain States of the Union, in their respective constitutions, recognize the existence of slavery in their limits. *Per* NAPTON, J. *Rennick v. Chloe*, vii. 197.

22. So that the State of Missouri is East of the Rocky Mountains. *Price v. Page*, xxiv. 65.

23. So that Warren County is in the third judicial circuit of this State, and that Franklin County is not. *The State v. Worrell*, xxv. 205.

b. OF WHAT THE COURTS WILL NOT TAKE JUDICIAL NOTICE.

24. The court will not take judicial notice of the laws of another State. *Leak v. Elliott*, iv. 446. *Hite v. Lenhart*, vii. 22.

25. Nor of the ordinances of a city. *Cox v. City of St. Louis*, xi. 431.

26. The party relying on them must set them out in his pleadings. *Mooney v. Kennett*, xix. 551.

27. Nor of the laws of a foreign country. *Charlotte v. Chouteau*, xxv. 465.

28. Nor of the fact that New Orleans is in the State of Louisiana. There must be an averment of that fact in the declaration. *Riggin v. Collier*, vi. 568.

29. Nor will a judge sitting in one county take judicial notice of a conviction

or *not. pros.* previously had before him in another. *The State v. Edwards*, xix. 674.

30. Nor will the Supreme Court take judicial notice of the acceptance by a railroad of the provisions of the railroad act of 1853. (Acts 1852-3, 121.) *Gorman v. Pacific Railroad*, xxvi. 441.

See SUPRA, 14.

V. PAROL AND SECONDARY EVIDENCE.

a. GENERALLY.

31. Secondary evidence must be the best in the power of the party to produce. *Philipson v. Bates*, ii. 116.

32. Parol testimony is inadmissible to contradict, enlarge, vary or add to a written instrument. *Singleton v. Fore*, vii. 515. *Ashley v. Bird*, i. 640. *Lane v. Price*, v. 101.

33. But, *Per* M'GIRK, J., such testimony is inadmissible to show the circumstances under which it was executed. *Brown v. Bank of Missouri*, ii. 191.

34. And so it is admissible to show the time, place and manner of performing the obligations of a written contract, where it is silent on these points. M'GIRK, J., *dis.* *Benson v. Peebles*, v. 132.

35. And where a written memorandum of a contract of sale does not purport to be a complete expression of the entire agreement, and is uncertain as to the property sold, the property may be designated by parol evidence. *Rollins v. Claybrook*, xxii. 405.

36. Where a note is made payable "in the currency of the State," it is not competent to show by parol testimony, that it was understood to mean any other than gold and silver, or notes of Missouri banks. *Cockrill v. Kirkpatrick*, ix. 688.

37. Parol evidence is not admissible to prove that, at the time of the execution of a bond, the obligee said he would not hold the obligor responsible thereon. *Woodward v. McGaugh*, viii. 161.

38. Nor is it admissible to show that the maker of a note, which purports to be payable absolutely, only promised to pay on condition. *Jones v. Jeffries*, xvii. 577.

39. But parol evidence is admissible to show the contents of a paper, where the original is beyond the jurisdiction of the court. *Brown v. Wood*, xix. 475.

40. Sworn copies of written instruments are admissible in evidence, where the originals are beyond the jurisdiction of the court. *Perpetual Ins. Co. v. Cohen*, ix. 416. *Bullitt v. Overfield*, ii. 4.

41. But not unless the original is accounted for, or notice given to produce it. *Lewin v. Dille*, xvii. 64.

42. Nor can the contents of a copy be shown until the existence of an executed original is established. *Perry v. Roberts*, xvii. 36.

43. Where a party, by his own act, renders an instrument such that all legal remedy thereon is lost, he cannot, by any other evidence, establish the covenants or

promises contained therein. Thus, where an instrument, under which A. has received money and become bound to B., is altered by B., he cannot recover of A., neither on the instrument, nor for money had and received. *Whitmer v. Frye*, x. 348.

44. An agreement in writing to convey such lots as the grantor shall select, cannot be changed by parol, so as to require the grantor to convey such lots as the grantee may select. *Wildbahn v. Robidoux*, xi. 659.

b. FRAUDULENT CONVEYANCES.

45. Parol evidence is admissible to establish the indebtedness of a fraudulent conveyancer to a third party, and the writings evidencing such indebtedness need not be produced. *Foster v. Wallace*, ii. 231.

c. SALE AND ASSIGNMENT.

46. Although parol evidence is not admissible to alter or impeach a bill of sale, yet such evidence is admissible to show that, in pursuance of an understanding between the parties at the time of making it, the slaves specified therein had been subsequently given, and possession of them delivered, so as to show title in the donee. *Broadwater v. Darne*, x. 277.

47. Parol evidence is admissible to show that a bill of sale, absolute on its face, was intended as a mortgage. [OVERRULING, *Montany v. Rock*, x. 506.] *Johnson v. Huston*, xvii. 58.

48. A. and B. were joint owners of a steamboat, but the legal title stood in A. alone, who sold and conveyed in writing one half of it to C.—*Held*, in a suit in the name of B. to recover the purchase money, that parol evidence was admissible to show that the sale and conveyance was understood, and intended by the parties to be that of the interest of B. *Bennett v. Bell*, xxii. 154.

49. If an assignment describes the obligations assigned as "the within notes," parol evidence is admissible to show that the notes were folded up and enclosed within the paper upon which the assignment was made, and thus delivered to the assignee. *Thornton v. Crowther*, xxiv. 164.

d. CONTENTS OF WRITING LOST OR ABSENT.

50. The absence of a paper must be accounted for before secondary evidence is admissible to show its contents. *Benton v. Craig*, ii. 198. *Cockrill v. Kirkpatrick*, ix. 688.

51. Parties may prove by their own oaths the loss or destruction of instruments of writing, but they cannot testify as to their contents. *Beachboard v. Luce*, xxii. 168.

52. Where a witness has been permitted to speak of the contents of a writing, without having it present or accounting for its absence, the court should exclude such evidence from the jury, if it is objected to while the witness is still testifying. *Filley v. Talbott*, xviii. 416.

e. SHERIFF'S DEED.

53. The fact that the sheriff of the county acknowledged, in open court, a deed to the plaintiff's grantor of the premises in dispute, such acknowledgment

stating the issue of execution and a levy and sale under it, is evidence sufficient to show that a deed from the sheriff once existed; and the contents of such deed may be established by secondary evidence, on its loss being shown in the usual way. *Newman v. Studley*, v. 291.

54. The recitals in a sheriff's deed cannot be contradicted by parol evidence. *Reed v. Austin*, ix. 713.

55. However vague the description in a sheriff's deed of land sold under execution, parol evidence is admissible to identify the premises, and such evidence does not fall within the rule which rejects oral testimony in explanation of a patent ambiguity. *Bates v. Bank of Missouri*, xv. 309.

56. A party relying upon a sheriff's deed to show title in himself, must produce the deed itself, or account for its absence, before secondary evidence of its contents can be admitted. *Smith v. Phillips*, xxv. 555.

f. WILLS.

57. Parol testimony is not admissible to explain an ambiguity apparent upon the face of a will. *Davis v. Davis*, viii. 56.

58. A will described land as the "south-east and south-west quarters of section 4, township 60, range 38, in Holt county, Mo." The devisee of the south-west quarter was to have access to the "big spring"—*Held*, that parol evidence was admissible to show that the testator never owned or claimed any land in section 4, township 60; that there was no such land as the two quarter sections described as being in section 4, township 60, it being a fractional section; that the spring commonly known as the "big spring" was on the south-east quarter of section 4, township 59, range 38; that the testator died on the last named section, &c. *Riggs v. Myers*, xx. 239.

g. RECEIPT.

59. No principle is better settled than that parol evidence is admissible to explain a receipt. *Weatherford v. Farrar*, xviii. 474.

60. But an instrument acknowledging the receipt of money for a slave, is not such a receipt as may be contradicted by parol testimony, so far as it evidences the sale of the slave. *Montany v. Rock*, x. 506.

61. Where a receipt was produced as evidence of money paid, it was allowed the defendant to show that the party to whom the receipt was given applied at one time for the receipt, stating that he wanted the receipt for particular reasons, naming them, and that he had paid the money to another person. *Huston v. Becknell*, iv. 39.

See SUPRA, 10.

h. NOTICE TO PRODUCE PAPERS AND BOOKS.

62. Notice to produce a notice need not be given to authorize the contents of the first notice to be shown by parol. *Hughes v. Hays*, iv. 209.

63. If a defendant, being ordered to produce a paper, states in excuse that the paper is in the hands of another, held by him for defendant and others, but does

not state that it is not under his control, the court may take its contents, as stated by the plaintiff, to be true. *Munford v. Wilson*, xix. 669.

64. A party cannot give evidence of the contents of books in the hands of the opposite party, without first having given notice to produce the books. *Farmers' and Merchants' Bank of Memphis v. Lonergan*, xxi. 46.

See PRACTICE, 284; . . . SUPRA, 15.

i. RECORD.

65. What a court of record does is known only by its records. Its proceedings cannot, therefore, be established by parol. *Milan v. Pemberton*, xii. 598.

66. But such testimony is admissible to show the loss and contents of an execution, and the officer's return thereon. *Ravenscroft v. Giboney*, ii. 1.

67. And so it is admissible to show the contents of a Justice's record of a judgment, the loss of the original record first being shown. *Bogart v. Green*, viii. 115.

68. So, it may be shown by *parole* that the transcript of a judgment obtained before a Justice was filed in the County Court. *Huston v. Becknell*, iv. 39.

69. But parol evidence is inadmissible to prove that the County Court, while in session, verbally ordered the name of one of the securities on a note given to their county to be erased, without the consent of the other security. The records of the County Court are the evidence of their official acts, and all orders not entered on record are extra-judicial and void. *Medlin v. Platte County*, viii. 235.

70. A trustee cannot prove by parol, without the record of the suit, the amount of costs incurred therein to recover the trust money. *Gates v. Hunter*, xiii. 511.

See RECORD, 7.

j. DEED.

71. Parol testimony cannot be resorted to to control the meaning of a deed, or to give it a different meaning from that which it carries on its face. *Simonds v. Beauchamp*, i. 589.

72. Although the receipt of the purchase money is acknowledged in a conveyance, it may be shown by parol evidence that it was not paid. *Hogel v. Lindell*, x. 483.

73. And in an action upon a covenant of seizin, parol evidence is admissible to show the true amount of the purchase money, although different from that stated in the deed. But where the operation of a deed, in respect to the interest or estate purporting to be conveyed, is sought to be affected, parol testimony is not admissible. *Henderson v. Henderson*, xiii. 151.

74. But it is not competent at law to show that a deed, absolute on its face, is, in fact, a mortgage. *Hogel v. Lindell*, x. 483.

75. Where there is a subscribing witness to an instrument, he must be called, or his absence accounted for; and without this, it is not competent to prove its execution even by the grantor. *Glasgow v. Ridgely*, xi. 34.

76. The fact that the subscribing witness was reported and believed to be dead, sufficiently accounts for his absence. *Waldo v. Russell*, v. 387.

77. Under the act of February 1, 1839, (Acts 1838-9, 42, §§ 10, 11,) relating to evidence, it is not necessary to prove the identity of the grantor in a deed by the subscribing witness, or to account for his absence; nor is his presence required by the rule that the best evidence must be produced. *Moss v. Anderson*, vii. 337.

78. To authorize the admission of an office copy of a deed in evidence, a copy of the certificate of acknowledgment should also be certified. *Gentry v. Garth*, x. 226.

79. Where a deed, executed and attested in the State of Tennessee, the grantor and the attesting witnesses residing there at the same time, is offered in evidence, its execution may be proved by proof of the handwriting of the grantor. It will be presumed that the subscribing witnesses are out of the jurisdiction of this State. A copy of the record in the State of Tennessee of such deed is inadmissible, unless it appear that such copies are evidence by the laws of Tennessee. *Clardy v. Richardson*, xxiv. 295.

k. SECURITIES.

80. Parol evidence is admissible to prove the identity of the principal and surety to a bond or note in a suit at law. *Garrett v. Ferguson*, ix. 124.

81. And so, also, to show that the relation of principal and surety exists between the co-obligors in a bond. *Scott v. Bailey*, xxiii. 140.

VI. DECLARATIONS AND ADMISSIONS.

a. BY A MASTER.

82. The declarations of a person holding another in slavery, as to the residence of the slave in Illinois, cannot be given in evidence until a foundation for such testimony is laid by proof of such residence with the consent of the owner. *Robert v. Melugen*, ix. 169.

b. BY A SLAVE.

83. The admission of a slave that he is such cannot be used in evidence against him, in a suit for his freedom. *Vincent v. Duncan*, ii. 214.

84. On the trial of a white person, the State may give in evidence a conversation between the defendant and a negro, when the statements of the negro are merely an inducement or in illustration of what was said by the accused; but such conversation must be proved by a white person. *Hawkins v. The State*, vii. 190.

85. Where a master is sued for a larceny by his slave, the slave's declarations as to where the property could be found, coupled with the fact that the property was there found, are admissible in evidence. *Fackler v. Chapman*, xx. 249.

86. In an action against a vendee for the purchase money of a slave, the declarations of the slave, in connection with and explanatory of a symptom or

appearance of disease, are, as a part of the *res gesta*, competent evidence to prove that the slave was, at the time of her sale, diseased. *Marr v. Hill*, x. 320. *Wadlow v. Perryman*, xxvii. 279.

C. BY A TESTATOR.

87. Where it is sought to invalidate a will on the ground that the alleged testator was under undue influence, and was, at the time of executing it, of unsound mind by reason of intoxication, declarations made by him to the effect that he had never made the will—that, if he had signed it, they had got him drunk and made him do it, for he had no recollection of it—are inadmissible in evidence. *Gibson v. Gibson*, xxiv. 227.

88. So declarations made by a testator before the date of the will, that the persons mentioned in it as legatees “should never have any of his property,” as also declarations made on divers occasions after such date, that “he had no will,” alone and unsupported by other facts, do not furnish any legal evidence whatever of incapacity on the part of such testator, or of undue influence, and are inadmissible in evidence. *Cawthorn v. Haynes*, xxiv. 236.

89. So where it is sought to invalidate a will on the ground that the children of the testator are “not named or provided for” therein, the testator having made his wife his sole heir, evidence is inadmissible to prove that at the time of making the will the testator declared that he would name no other persons, that he had done all for his children he intended to do, and that he designed all he had at his death to go to his wife absolutely. *Bradley v. Bradley*, xxiv. 311.

D. BY INTESTATE.

90. In a suit by administrators, their intestate’s declarations are not admissible in evidence for them. *Perry v. Roberts*, xvii. 36.

E. BY ADMINISTRATOR.

91. As to the competency of the admissions of an administrator, a party to a suit, in evidence against the State. *Allen v. Allen*, xxvi. 327.

F. BY A PARTNER.

92. A declaration by one of a firm, after the death of the intestate, that the firm owed the intestate eleven hundred dollars, is evidence of an account stated with the intestate in his lifetime. *Cunningham v. Sublette*, iv. 224.

93. The declarations of one partner are not evidence of the partnership against any one but himself. *Dixon v. Hood*, vii. 414.

94. An article written by A., and published in a paper edited by A. and B., cannot be read in evidence as an admission of B. *Coze v. Whitney*, ix. 527.

95. An admission of indebtedness made by one partner will not bind the other members of the firm, unless made during the existence of the partnership. A deposition proving such admission, but not satisfactorily establishing it as at a time prior to the dissolution of the partnership, may be excluded, and need not be submitted to the jury with instructions. *Scott, J., dis. Little v. Ferguson*, xi. 598.

96. After a partner has retired from the firm, and transferred to the other partners all his rights and interest in the accounts and claims due to the firm, he cannot, by his admission of the payment of a particular account, prejudice the rights of the remaining partners in the collection of such account. *American Iron Mountain Co. v. Evans*, xxvii. 552.

97. An admission made by a member of a firm after the retirement of another member, is not admissible against such retiring partner. *Pope v. Risley*, xxiii. 185.

98. In a suit against A. and B. as partners, the declarations of A. are inadmissible in behalf of B. to disprove the partnership alleged. *Young v. Smith*, xxv. 341. *Clark v. Huffaker*, xxvi. 264.

99. Nor where B.'s declarations are resorted to to prove the partnership as against him, can he disprove such declarations by his declarations of a contradictory character. *Clark v. Huffaker*, xxvi. 264.

G. BY AGENT OR EMPLOYEE.

100. The admission of an agent that goods sold by him were the property of his principal, may be given in evidence on a trial between the principal and the creditors of the agent, to show that the goods did not belong to the agent; and a receipt given to the agent by one to whom he had entrusted, for collection, an order for the proceeds of the goods, is also competent evidence. *Bell v. Glover*, i. 573.

101. The declarations of an agent at the time of selling property, tending to show that he claimed and sold the property as his own, are competent evidence on behalf of a purchaser from such agent to show title in the agent. *Greene v. Chickering*, x. 109.

102. The declaration of an agent binds the principal only when it is made during the continuance of the agency, in regard to transactions then depending; and the declarations of the captain of a steamboat, as to the cause of a collision, are inadmissible against the owner. *Rogers v. McCune*, xix. 557.

103. Where the question was as to the negligence of the officers of a boat, the declarations of the pilot are not admissible in evidence. *Ready v. St. Bt. Highland Mary*, xx. 264.

104. The declarations or admissions of one who assumes to be agent for another, are not of themselves admissible to prove the agency. *Craighead v. Wells*, xxi. 404.

105. The plaintiff sued for the value of certain horses taken by the defendant on an execution against one C. The plaintiff claimed that the horses were purchased for her by C. as her agent—*Held*, that the declaration of C., while making the purchases, that he was buying for himself, was admissible in evidence; and that it might be shown that C. was at the time insolvent. *McNeeley v. Hunton*, xxiv. 281.

H. BY PRINCIPAL AND SURETY.

106. A surety is not bound by the admissions of his principal unless made in the course of his business. *Blair v. Perpetual Ins. Co.*, x. 559.

107. The admissions of a constable, forming no part of the *res gesta*, are not evidence against his sureties. *The State v. Bird*, xxii. 470.

108. In an action on an official bond against the principal and sureties, the admissions of the principal, made after the expiration of his term of office, are not evidence against the sureties. *City of St. Louis v. Foster*, xxiv. 141.

i. BY A GRANTOR.

109. The declarations of a grantor, before his purchase of the lot in dispute, are no part of the *res gesta* of a subsequent sale by him, and are not admissible as evidence of the consideration of the sale to his vendee. *Gamble v. Johnson*, ix. 597.

110. The declarations of a grantor, made at the time of executing a conveyance, are part of the *res gesta*, and are evidence to show the intent of the grantor in executing the deed, as against him, and all persons claiming under him. *Ibid.*

111. Declarations made by the grantor in a deed of trust, after its execution, in support of the deed, are admissible, but those against it are not. *McLaughlin v. McLaughlin*, xvi. 242.

j. BY VENDOR.

112. Where slaves remained in the hands of the vendor until his death, and were then taken possession of by the vendee, who was thereupon sued as executor, *de son tort*, and who, on trial, proved that the vendor, while the slaves were in his possession, declared them not to be his, but to be the property of the vendee, it is competent for the adverse party to show that the vendor, on another occasion after the sale, and while he was in possession, declared that the slaves were his own. *Foster v. Nowlin*, iv. 18.

113. The fact that a vendor's declarations, after a sale, have been given in evidence to establish title in the vendee, does not render admissible for the adverse party his declarations made at a different time, and not in the presence of the vendee. (*Foster v. Nowlin*, iv. 18, commented upon and explained.) *Wilson v. Woodruff*, v. 40.

k. BY A WIDOW.

114. In a controversy between the heirs and the husband of the widow of a deceased person, in reference to his property, the declarations of the widow are not admissible. *Wall v. Coppedge*, xv. 448.

l. BY PARTIES TO ACTION.

115. An acknowledgment by the plaintiff that he received money from the defendant, but at the same time stating that it was as a loan, is not an admission of payment. *Oldham v. Henderson*, iv. 295.

116. Where, on a trial before a Justice, the defendant testified on the demand of the plaintiff, (R. S. 1835, 361, § 16,) and the case was appealed, the plaintiff cannot show, on the trial in the appellate court, the admissions or disclosures of the defendant in his testimony before the Justice. *Martien v. Barr*, v. 102.

117. The statements and declaration of a party are not admissible in evidence in his own favor, unless they form a part of the *res gesta*, or are made in the presence of the adverse party. *Mulliken v. Greer*, v. 489. *McLean v. Rutherford*, viii. 109.

118. Where the declarations of a party are given in evidence against him, he is entitled to the entire statement, and all that was said by him connected therewith on the same occasion. *Howard v. Newsom*, v. 523. *Reeves v. Hardy*, vii. 348.

119. The admissions of a party of record are admissible, although he has parted with his interest in the suit; and his ceasing to be a party by death, before the admissions are offered in evidence, will not exclude them. *Dillon v. Chouteau*, vii. 386.

120. Where the parties to a suit have a joint interest in the matter in controversy, whether as plaintiffs or defendants, an admission made by one is, in general, evidence against all. *Armstrong v. Farrar*, viii. 627. *Hurst v. Robinson*, xiii. 82.

121. It is not essential to constitute a statement an admission, that the party should have personal knowledge of the facts admitted. Where a party believes a fact to be true, upon evidence satisfactory to his own mind, his statement of it, when against his interest, is evidence, though of an unsatisfactory character. *Sparr v. Wellman*, xi. 230.

122. The statement of a party to a suit that he supposed he should lose the cause, is not admissible in evidence. *Crockett v. Morrison*, xi. 3.

123. Declarations or admissions made by a party to a suit, are not conclusive as to the truth of the facts submitted. *Cafferatta v. Cafferatta*, xxiii. 235.

See HUSBAND AND WIFE, 116.

M. BY PARTY IN POSSESSION.

124. The declarations of a person in possession of property are not admissible as evidence in his favor, or in favor of those claiming under him to show title in such person. [*Foster v. Nowlin*, iv. 18, commented upon and questioned.] *Turner v. Belden*, ix. 787. *Criddle v. Criddle*, xxi. 522.

125. But the declarations of a party made while in possession of personal property, against his title, are admissible in evidence against a party claiming under him. *Cavin v. Smith*, xxi. 444. *Burgess v. Quimby*, xxi. 508. *Criddle v. Criddle*, xxi. 522.

126. The declarations of a party in possession of property against his interest are admissible in evidence against one claiming under him, where the declarations were made prior to the inception of the successor's title. *Cavin v. Smith*, xxiv. 221.

127. Declarations of a person in possession of land as a life tenant cannot be received in evidence to make his life estate an estate in fee. *Watson v. Bissell*, xxvii. 220.

N. BY A WITNESS.

128. The declarations of a witness not made under oath are not admissible to corroborate his evidence given on oath. *Riney v. Vanlandingham*, ix. 807.

129. Evidence of the declarations of a witness, which would otherwise be inadmissible, is admissible where they constitute a part of the transaction. [*Hawkins v. The State*, vii. 190, referred to in illustration.] *Crowther v. Gibson*, xix. 365.

See WITNESS, 10.

O. BY OBLIGEE IN A BOND.

130. Admissions by the obligee of a bond, while he was the owner of it, that it was given for an illegal consideration, are competent evidence against his assignee. *Murray v. Oliver*, xviii. 405.

131. And if evidence of his admissions is rejected, the error is not cured by the fact that the obligee is afterwards sworn as a witness, at the instance of the party offering them. *Ibid*.

See INFRA, 171.

P. BY AN ASSIGNOR OF A CHOSE IN ACTION.

132. The declarations of the assignor of a chose in action after assignment, are not admissible in evidence against the assignee. *Garland v. Harrison*, xvii. 282.

Q. BY HEIR AND DEVISEE.

133. Declarations made in the lifetime of the deceased, by one whose wife was likely to become an heir to his estate, touching the situation of the property of deceased, are inadmissible. *Morton v. Massie*, iii. 482.

134. Upon a trial for the purpose of determining the validity of a will, where several of the devisees, who were also executors, are made defendants, the declarations of one of them as to the state of mind of the devisor, at the time of making the will, may be given in evidence against all the defendants. *Armstrong v. Farrar*, viii. 627. *Allen v. Allen*, xxvi. 327.

R. BY A SHERIFF.

135. Declarations made by a sheriff, previous to the day of sale of property taken in execution, are not admissible to defeat the title of a *bona fide* purchaser at such sale. *Kean v. Newell*, ii. 9.

S. BY OWNER AND OFFICER OF A BOAT.

136. An officer of a boat cannot bind it by his admissions, but the owners can. *Phelps v. St. Bt. Eureka*, xiv. 532.

137. But the admissions of the owner of a boat, made after the boat has been seized and ordered to be sold, are not competent to establish a demand presented for allowance as a lien upon the proceeds. *Renshaw v. St. Bt. Pawnee*, xix. 532.

See SLAVES AND SLAVERY, 21.

T. MISCELLANEOUS.

138. What is said by those soliciting persons to sign an instrument is, as a

a part of the *res gesta*, evidence of its contents as regards an alleged erasure therein. *Matthews v. Coalter*, ix. 696.

See CHANCERY, 135, 136; . . . CRIMINAL LAW, 363-365; . . . SUPRA, 9.

VII. ADMISSIONS BY PLEADING.

a. IN CHANCERY PRACTICE.

139. An answer not responsive to a bill is not evidence when replied to, nor is a fact stated by a party, but not upon his own knowledge, entitled to the same weight as one stated upon his personal knowledge. *Per* SCOTT, J. *Gamble v. Johnson*, ix. 597.

140. The defendant's answer is not evidence for him on the trial of an issue, unless so ordered by the chancellor, or read by the plaintiff as an admission. *Ibid.*

141. The statements in a bill in chancery are not usually evidence against the complainant unless sworn to, and not then as to matters stated on information merely. *Hall v. Guthrie*, x. 621.

142. Where an answer does not positively, clearly and precisely deny an allegation in a bill, it is not necessary that it should be contradicted by two witnesses. So, also, where the answer is not sufficiently distinct upon points as to which the defendant is presumed to be well informed. *Martin v. Greene*, x. 652.

143. The new code does away with the rule in respect to the weight of an answer in chancery. If an answer sets up new matter in defense, the burden of proof is on the defendant. *Walton v. Walton*, xvii. 376.

144. Under the chancery practice which prevailed before the enactment of the new code, an answer, if responsive to the bill, was to be taken as true, if no replication was filed. *McQueen v. Chouteau*, xx. 222.

See CHANCERY, 150-155.

b. IN PRACTICE AT LAW.

aa. *By Demurrer.*

145. Where a judgment upon demurrer is entered for the plaintiff, the plaintiff's cause of action is admitted as stated in his pleading, and the only matter for the jury on an inquiry is to ascertain the amount of damages. *St. Bt. Reveille v. Case*, ix. 498.

146. A demurrer does not admit the items of an account set forth in a petition so as to do away with the necessity of proof of them. *Darrah v. St. Bt. Light-foot*, xv. 187.

bb. *By the Answer.*

147. The date when an account sued on accrued is not a material averment in a petition, and is not admitted by a failure to deny it in the answer. *Sutler v. Streit*, xxi. 157.

148. Where a petition is amended, by inserting a material averment, and this averment is not answered, it is deemed to be admitted. *Robards v. Munson*, xx. 65.

149. But not unless it be a material averment, and be so stated in the petition as to bring to the mind of defendant its importance in the trial of the cause. *Wood v. St. Bt. Fleetwood*, xix. 529. *Field v. Barr*, xxvii. 416.

150. Where an answer is withdrawn, the traversable allegations of the petition stand admitted. *Price v. Page*, xxiv. 65.

151. So in case of judgment by default for want of an answer. *Robinson v. Lawson*, xxvi. 69.

152. Where in a petition it was alleged that the defendant "wrongfully entered upon a certain tract of land, &c., of which plaintiffs were the owners and in possession, and took from said premises a house thereon situated, used and employed as a Methodist meeting house," and the defendant in his answer "denied that he wrongfully entered upon the premises, and took therefrom a Methodist meeting house of said plaintiffs"; and the defendant charges the fact to be, that the house spoken of was his (defendant's) property, and not owned or claimed by plaintiffs;"—it was *held* that this was an admission of the entering and taking away of the house. *Emory v. Phillips*, xxii. 499.

153. Where the plaintiff used one part of the defendant's answer as evidence, it was *held*, that the defendant had no right to use other parts of the same answer as evidence for himself. *Gunn v. Todd*, xxi. 303.

See PRACTICE, 120.

VIII. ONUS PROBANDI.

154. Where the burden of proof lies upon one party, it cannot be thrown upon the other party by the form of the pleading. *The State v. Melton*, viii. 417.

155. In an action against a sheriff, for failing to make return of an execution, the burden of proof lies upon the sheriff. The plaintiff is not bound to prove the allegation that the sheriff did not make return of the execution according to the command thereof. *Ibid.*

156. Where, in an action on the compound covenant of seizen of an inde-feasible estate in fee simple, the plaintiff, in assigning the breach, simply negatives the words of the covenant, and the defendant replies that he was seized, &c., the burden of proof is on the defendant, but the plaintiff can recover only nominal damages, unless he shows the extent of incumbances, or the want of seizin in the defendant. *Bircher v. Watkins*, xiii. 521.

157. Under the plea of payment, the burden of proof is on the defendant, who must prove the payment of money, or something accepted in its stead. *Farnell v. Anderson*, xiv. 619.

158. In an action against an administrator, *de bonis non*, the burden of proof is upon the plaintiff, to show the amount of assets that went into his hands, and a failure to account for them. *The State v. Collier*, xv. 293.

IX. EXAMINATION OF PARTIES.

159. Where there are more than one plaintiff or defendant to a suit originating in a Justice's court, and the testimony of such parties is desired, all should be required to testify. The testimony of those required to testify, or, in the event of their refusal, the testimony of the opposite party can only be used against such as are called upon to testify, and is no evidence against the others. [*Levy v. Hawley*, viii. 510, explained.] *Grigg v. Bodrio*, ix. 222.

160. A suit upon a promissory note was defended upon the ground that the defendant was merely a security, and had given notice to the plaintiff to sue, which he had not done. The plaintiff was examined as a witness and was asked to state who was principal upon the note. In answer, the plaintiff stated that the defendant was principal, "for the reason that said note was given to secure the payment of the purchase money for a certain tract of land sold by the plaintiff to the defendant"—*Held*, that the reason thus assigned did not amount to, "new matter" within the statute, (Acts 1848-9, 99, § 9.) *Christy v. Horne*, xxiv. 242.

X. EVIDENCE IN PARTICULAR CASES.

a. EXECUTION OF INSTRUMENT SUED ON.

161. The plaintiff must produce the instrument sued on, upon the trial. The only effect of the statute, (Geyer's Dig., 250, § 23—1 Ter. L. 115, § 27,) is to relieve the plaintiff from proof of its execution, where that fact is not denied on oath. *Labeaume v. Labeaume*, i. 487. *Hanly v. Reed*, i. 487. *Holmes v. All*, i. 419. *Foster v. Nowlin*, iv. 18. *Hickman v. Kunkle*, xxvii. 401.

162. And this only applies to such instruments as are made the foundation of the action. *Collins v. Bowmer*, ii. 195. *Maupin v. Triplett*, v. 422.

163. And does not place simple contracts on the footing of sealed instruments. *Carroll v. Corn*, i. 161. *Wahrendorff v. Whitaker*, i. 205.

164. The statute applies to suits against executors on notes executed by the deceased. *Soulard v. Pratte*, i. 571. *Vincent v. Pitman*, i. 712.

165. But where a note is executed by an agent, and that fact appears on its face, the authority of the agent must be shown. *Wahrendorff v. Whitaker*, i. 205.

166. These principles apply to the R. S. 1835, 463, § 18. *Fields v. Hunter*, viii. 128.

167. And embrace an action on an acceptance of a bill of exchange. *Warne v. Anderson*, vii. 46.

168. But under this latter statute the plaintiffs must show that they compose the firm of A. & Co., where the note sued on is payable to such firm. *Dempsey v. Harrison*, iv. 267.

169. The admission of incompetent evidence in proof of the execution of an instrument, no proof on that point being necessary, is not error. *Foster v. Nowlin*, iv. 18.

170. The fact that the defendant permitted a bill of sale to be read in evidence on two previous trials, without proof of its execution, does not make it evidence on a third trial, without proof. *Baldrige v. Walton*, i. 520.

171. Every instrument that is attested, whether under seal or not, ought to be proved by a subscribing witness, and an acknowledgment by the obligor himself, admitting that he executed the instrument, will not dispense with the testimony of the subscribing witness. *Smith v. Mounts*, i. 671.

172. And the execution of the instrument can be proved by such witness only when it is before him when his testimony is taken. *Neale v. McKinstry*, vii. 128.

173. Under the statute, (R. S. 1845, 655, § 26,) the only consequence of a failure to deny the execution of a note sued upon under oath, is, to relieve the plaintiff from the necessity of proving its execution. Under a plea of *non est factum*, without affidavit, every other defense is admissible. *Klein v. Keyes*, xvii. 326.

174. Where promissory notes, purporting to have been executed by an agent, are sued on, the ordinary denial of their execution, without the verification required by statute, (R. S. 1845, 819, § 23,) is sufficient. *Pope v. Risley*, xxiii. 185.

See JUSTICE OF THE PEACE, 30.

b. PRIVILEGED COMMUNICATIONS.

175. Communications made by a client to an attorney at law, while employed in that capacity, are privileged, and are inadmissible in evidence, though, at the time such communications were made, judicial proceedings may not have been commenced or contemplated. *Johnson v. Sullivan*, xxiii. 474.

176. And the attorney cannot be permitted to testify concerning them without the consent of his client. The rule applies to the case where two persons, having hostile interests, jointly consult the same attorney at the same time with respect to the matter in dispute, and one of such parties calls upon the attorney to testify with respect to the declarations and admissions made by the other at the consultation. Whether a communication is privileged is a question for the court. *Hull v. Lyon*, xxvii. 570.

See WITNESS, 59.

c. CHURCH REGISTRY.

177. Church registers are not admissible in evidence, except by special statute unless they are, by the civil law of the country or State where kept, recognized as documents of an authentic and public nature, and then recitals therein are not admissible as evidence of pedigree. *Childress v. Cutter*, xvi. 24.

d. ACCOUNT AND ACCOUNT RENDERED.

178. An account rendered to a merchant, who keeps it for a long time without making any objection thereto, is presumed to be correct; and the same doctrine applies to other persons, between whom are accounts current or accounts in the ordinary course of business. *Shepard v. Bank of Missouri*, xv. 143.

179. It is no objection to the admission of an account offered in evidence, that it varies somewhat from that filed in the cause. *Murdoch v. Finney*, xxi. 138.

E. ACCOUNT BOOKS AND MEMORANDA.

180. Loose memoranda of a book-keeper, not made in the course of his employment, are not admissible in evidence against his principal. *Lackey v. Schreiber*, xvii. 146.

181. Where the books of the plaintiff are introduced as evidence by the defendant, it is competent for the plaintiff also to use them. *Beach v. Curle*, xv. 105.

182. A plaintiff's books of account kept by his sons, absent at the time of the trial in another State, accompanied by his suppletory oath, are not admissible evidence in his favor, nothing appearing to show that the entries were made at or near the time of sale. *Penn v. Watson*, xx. 13.

183. A plaintiff's book of original entries, sworn to by him, is not admissible evidence in an action for goods sold and delivered. *Hissrick v. McPherson*, xx. 310.

184. In a suit for work and labor, evidence that the services sued for were charged to the defendant on the plaintiff's books, is inadmissible. *Dozens v. Barrett*, xxiii. 544.

See SUPRA, 4, 5.

F. CHARACTER.

185. A witness, called to prove general character, will not be suffered to testify to his own individual knowledge of acts of recklessness. *Patrick v. St. Bt. J. Q. Adams*, xix. 73.

186. The character of either party to a civil suit cannot be inquired into, unless it is put in issue by the nature of the proceeding itself. *Gutzwiller v. Lackman*, xxiii. 168.

187. It is inadmissible to show the reputation of the plaintiff for chastity among a majority of her neighbors, with whom the witness had conversed. *Adams v. Hannon*, iii. 222.

See HUSBAND AND WIFE, 115.

G. MISTAKE.

188. It is not necessary, in order to establish a mistake in an instrument, to show that particular words were agreed upon to be inserted; it is sufficient that the parties had agreed to accomplish a particular object, and that the instrument as executed is insufficient to effect their intention. *Leitensdorfer v. Delphy*, xv. 160.

189. Although it is said that the evidence required to prove a mistake, when it is denied, must be as satisfactory as if the mistake were admitted, yet this and similar remarks of judges, however distinguished, form no rule of law to direct courts in dispensing justice. When the mind of a judge is entirely convinced upon any disputed question of fact or law, he is bound to act upon the conviction. *Ibid.*

h. LEX NON SCRIPTA.

190. The writings of eminent lawyers, and the reported decisions of courts, are evidences of the unwritten law in civilized countries. *Marguerite v. Chouteau*, iii. 540.

i. HANDWRITING.

191. A witness may acquire such knowledge of a person's handwriting as to render him competent to testify to his signature, by having seen his letters on business, and finding that he recognized and acted upon them. *Scott, J., dis Reyburn v. Belotti*, x. 597.

j. DOCUMENTARY.

192. A search warrant is not admissible in evidence for any purpose, unless it appears to have been founded upon the proper oath. *Halsted v. Brice*, xiii. 171.

193. To make the contents of a document (a periodical publication) in a foreign language evidence, it must be translated, and be brought home to the knowledge of the party against whom it is sought to be used. *Meyer v. Witter*, xxv. 83.

k. NAME.

194. The possession of a note by Charles R. Rogers which had been assigned to C. R. Rogers, is evidence tending to show that he is the same person named in the assignment. *Birch v. Rogers*, iii. 227.

195. A note signed "Christ. A." will support a declaration against "Christopher A.;" the court will take notice of such common abbreviations. *Weaver v. McElhenon*, xiii. 89.

See ADMINISTRATION, 7-10, 30-32; . . . AGENCY, I; . . . APPEAL, 87; . . . ASSUMPSIT, IV; . . . ATTACHMENT, VIII; . . . ATTORNEY AT LAW, 13, 14; . . . BILLS OF EXCHANGE AND PROMISSORY NOTES, 18, 19, 85, 86, 95, 96; . . . BOATS AND VESSELS, XII; . . . BONDS, NOTES AND ACCOUNTS, 91-93; . . . CHANCERY, 183, 184; . . . CONFIRMATIONS AND GOVERNMENT GRANTS—See PUBLIC LANDS, 78-91, 101-108; . . . CONSIDERATION, IV; . . . CONTRACT, XI; . . . CONVEYANCES, 12-17, III; . . . COVENANT, 30-33; . . . CRIMINAL LAW, IX; . . . DEBT, II; . . . DRAMSHOP, 27-34; . . . EJECTMENT, 26-35; . . . EXECUTION, 110, XVI; . . . FRAUD, I; . . . FRAUDULENT CONVEYANCES, IV; . . . FREEDOM, 13-17; . . . LAWS, II; . . . LIBEL AND SLANDER, IV; . . . MALICIOUS PROSECUTION, III; . . . MASTER AND SERVANT, 9; . . . MASTER AND SLAVE, 11; . . . MECHANICS' LIEN, 26, 27; . . . NEW MADRID CERTIFICATES—See PUBLIC LANDS, 187-189; . . . PARTITION, 17, 18; . . . PARTNERSHIP, II; . . . PETITION IN DEBT, II; . . . REPLEVIN, V; . . . SECURITIES, VII; . . . TRESPASS, VI; . . . TROVER, VIII; . . . USURY, V.

XI. INTRODUCTION AT TRIAL.—See PRACTICE, 147-166, 193, 194, 225, 306-322.

See PRACTICE IN SUPREME COURT, IV;....PROCESS, IV;....RECORD, II;....REVENUE, 7-9.

EXECUTION.

I. TIME AND MODE OF ISSUING.

- a. WHEN IT MAY ISSUE.
- b. ALIAS EXECUTION.
- c. ON CONFESSION OF JUDGMENT BEFORE JUSTICE.
- d. AGAINST BAIL.
- e. ON TRANSCRIPT FROM JUSTICE.
- f. AGAINST DECEDENT'S ESTATE.

II. SETTING ASIDE, QUASHING AND ENJOINING.

III. TIME AND MANNER OF SERVING.

IV. LEVY.

V. EXEMPTION FROM.

VI. WHAT IS, AND WHAT IS NOT SUBJECT TO EXECUTION.

VII. LIEN.

VIII. TRIAL OF THE RIGHT OF PROPERTY.

IX. INDEMNIFYING AND DELIVERY BOND.

X. SALE.

- a. NOTICE.
- b. TIME AND MANNER OF SALE.
- c. CONSIDERATION.
- d. DESCRIPTION.
- e. VALIDITY.
- f. FRAUD.
- g. TITLE ACQUIRED UNDER.
- h. DUTY OF OFFICER.
- i. NOTICE TO SET ASIDE.
- j. LIABILITY AND RIGHTS OF PURCHASER.
- k. WARRANTY.
- l. ON EXECUTION FROM UNITED STATES COURT.
- m. EVIDENCE.

XI. DISTRIBUTION AND APPROPRIATION OF PROCEEDS.

XII. SATISFACTION OF EXECUTION.

XIII. LIABILITY, RIGHTS AND DUTIES OF OFFICER.

XIV. SHERIFF'S DEED.

XV. RETURN.

XVI. WRIT AS EVIDENCE.

I. TIME AND MODE OF ISSUING.

a. WHEN IT MAY ISSUE.

1. The section of the new code, (Acts 1849, 92, § 2,) which provides that "after the lapse of five years from the entry of judgment, an execution may be issued only by leave of the court, on motion, with notice to the adverse party," applies to judgments existing at the time the act went into effect; the application is the same, even if execution has been sued out within the five years. *Bolton v. Lansdown*, xxi. 399.

b. ALIAS EXECUTION.

2. Where a levy has been made under execution issued in accordance with the statute, an alias execution cannot regularly be issued, until the first levy is exhausted. *Baily v. Gentry*, i. 164.

3. Where a writ of execution has been issued within a year and a day after judgment rendered, and is returned "not satisfied," another execution may issue after the lapse of a year and a day from the return of the first, without a revival of the judgment by *scire facias*. *Dowgman v. Potter*, i. 518. *Lindell v. Benton*, vi. 361. *Clemens v. Brown*, ix. 709.

c. ON CONFESSION OF JUDGMENT BEFORE JUSTICE.

4. Where a defendant in a Justice's court appears at the return day and confesses judgment, and an entry of such confession is made upon the Justice's docket, an execution may lawfully issue, although no entry is made upon the docket of a judgment upon the confession. *Franse v. Owens*, xxv. 329.

d. AGAINST BAIL.

5. A Justice has no power under the statute (R. S. 1835, §64, § 15,) to issue execution against a party as bail of another against whom there was an unsatisfied judgment, because such party had promised to become bail in the case, and considered himself liable as such. *Amonett v. Nicholas*, v. 557.

e. TRANSCRIPT FROM JUSTICE.

6. Where judgment is obtained before a Justice, and a transcript is filed in the Circuit Court, and the clerk issues an execution thereon, it must affirmatively appear, in order to the validity of such execution, that a prior execution had been issued by the Justice rendering the judgment which had been duly returned *nulla bona* by the officer, and the record of the Justice is the proper evidence of that fact. *Coonce v. Munday*, iii. 373. *Burk v. Flurnoy*, iv. 116. [But see *Murray v. Laften*, xv. 621.]

7. It is not sufficient that the clerk recites in the execution issued by him that such prior execution was issued and returned *nulla bona*. *Coonce v. Munday*, iii. 373.

8. Nor is it sufficient that the officer returned on the Justice's execution, "not satisfied by levying on property and making \$29." The return must show that the judgment debtor had no more goods. *Burk v. Flurnoy*, iv. 116.

9. A certified copy of an execution, and the return of *nulla bona* thereon from the Justice, is evidence sufficient upon which to justify the issuing of execution by the clerk. *Wineland v. Coonce*, v. 296. *Williams v. Boyce*, xi. 537. *Crowley v. Wallace*, xii. 143.

10. A judgment having been recovered in a Justice's court, and a large portion of it paid, an execution issued from the Circuit Court on a transcript of the judgment filed in the clerk's office, will not be quashed for informality in the proceedings before the Justice, when it appears that the defendant had appeared and submitted to the judgment. *Grissom v. Allen*, x. 303.

11. Where a defendant, in a suit before a Justice, is served with process in the township in which the suit is begun, it will be presumed, in the absence of evidence to the contrary, that he resides in such township, and the return of the constable on an execution of "no property found of defendant in said township whereof to levy," is sufficient to warrant the issuing of execution from the office of the clerk of the Circuit Court. *Franse v. Owens*, xxv. 329.

12. Where a Justice, in case of separate suits by different parties against the same person, certifies the judgments as a single judgment to the Circuit Court, an execution, or other proceeding thereon, should be quashed and set aside. *Bain v. Chrisman*, xxvii. 293.

See MECHANICS' LIEN, 30.

f. AGAINST DECEDENT'S ESTATE.

13. After the expiration of eighteen months from the time of granting letters testamentary, or of administration, an execution may issue on a judgment obtained before death, against either the testator or intestate, or against his executor or administrator after death. (Act of 1817, 1 Ter. L. 510, § 5.—Act 1822, 1 Ter. L. 926, § 28.) *Beauchamp v. Best*, i. 661. *Scott v. Whitehill*, i. 691. *Carson v. Walker*, xvi. 68.

14. But the act of Dec. 30, 1826, which took effect May 1st, 1827, (2 Ter. L. 103,) abolished executions against the estates of deceased persons. Under prior statutes they were legal till that time. *Carson v. Walker*, xvi. 68. *Miller v. Doan*, xix. 650. *Sweringen v. Eberius*, vii. 421.

II. SETTING ASIDE, QUASHING AND ENJOINING.

15. An injunction cannot issue from the court in one county to enjoin an execution issued from the court of another county. [*Reed v. Vaughn*, x. 447, referred to and applied.] *Pettus v. Elgin*, xi. 411.

16. Nor can a court of one county quash an execution issued to the sheriff of that county from the court of another county. *McDonald v. Tiemann*, xvii. 603.

17. Although motions to set aside proceedings under an execution should be made during the return term of the writ, yet, where, by authority of the court, the return of the writ is made at a term subsequent to the return term, the court may, at such subsequent term, entertain a motion to set aside the proceedings under the execution for irregularity. *Nelson v. Brown*, xxiii. 13. See JURISDICTION, 160; . . . CHANCERY, 107.

III. TIME AND MANNER OF SERVING.

18. An officer has until the return day of the writ to execute it, unless there are special circumstances which make it his duty to execute it sooner. *The State v. Ferguson*, xiii. 166. *The State v. Rollins*, xiii. 179.

19. It is competent for a sheriff to show that the defendant, in an execution placed in his hands, was out of his county after that time until he applied for the benefit of the bankrupt law, as an excuse for not serving the execution. *The State v. Rollins*, xiii. 179.

IV. LEVY.

20. Under the statute of 1824, relating to corporations, (R. S. 1825, 223,) an execution against a corporation should run only against lands, goods, &c. *Lindell v. Wash*, iii. 512.

21. An execution on a judgment against a principal and surety, levied on property of the principal, which cannot be sold for want of bidders, may still be levied on the property of the surety. Although the constable, by failing to sell such property, becomes liable, the surety is not discharged. *Moss v. Craft*, x. 720.

22. Under an execution against two, the sheriff cannot take the property of one defendant and the body of the other. *Usher v. Thomas*, x. 761.

23. A sheriff having money in his hands, collected on an execution in favor of A., cannot, on receiving an execution against A., levy it thereon, but the court may direct it to be so applied, if the right of no third party has accrued thereto. *Ex parte Fearle*, xiii. 467.

24. An execution, issued under a judgment against one of two partners, may be levied upon his entire interest in the partnership effects, or upon his interest in any portion of them. And in levying such an execution upon partnership property, the sheriff may seize and take into his possession a portion, or the whole of the partnership effects, and may give possession to the purchaser thereof at an execution sale. *RICHARDSON, J., dis. Wiles v. Maddox*, xxvi. 77.

25. But the purchaser at such a sale acquires only the interest of the debtor partner in the property sold. *Ibid.*

V. EXEMPTION FROM.

26. Where a mechanic abandons his business and absconds, the tools of his trade are not exempt from seizure and sale on execution. *Davis v. Wood*, vii. 162.

27. The specifications of property exempt from execution are cumulative. (R. S. 1835, 255, § 15.) Where a mechanic is the head of a family, the statute exempts the same property from execution which is exempt when owned by the head of a family who is not a mechanic, in addition to the tools of his trade. *Harrison v. Martin*, vii. 286.

28. A man who controls, supervises and manages the affairs about the house is the "head of a family," within the meaning of the statute, (R. S. 1845, 477, § 11,) and such a man need not necessarily be a husband or a father. *Wade v. Jones*, xx. 75.

29. Under the act of 1847, (Acts 1846-7, 52,) every head of a family may hold property to the amount of \$150 exempt from execution, whether he owns any of the property mentioned in first and second clauses of § 11 of act of 1845, or not. *The State v. Farmer*, xxi. 160.

30. It is no defense to an action by a debtor against his creditor, for selling on execution property at the time alleged to be exempted, that the debtor had, at the time of the levy and sale, other property concealed more than sufficient in value to pay the debt. *Megehe v. Draper*, xxi. 510.

31. Under the act amendatory of the act concerning executions, approved March 5, 1849, (Acts 1848-9, 67,) property acquired by the husband by purchase after marriage, is not exempt from execution for debts contracted by the wife before marriage. *Phelps v. Tappan*, xviii. 393.

32. Where a wife, a minor, owns land, the husband's estate therein during marriage may be sold for his debts. *Schneider v. Staihr*, xx. 269. [QUESTIONED IN *Harvey v. Wickham*, xxiii. 112.]

33. The act of 1849, (Acts 1848-9, 67,) by which certain property of the wife is exempted from the debts of the husband, applies only in cases where the debts are contracted after the passage of the act, and previous to the time the wife came into the possession of the property. *Cunningham v. Gray*, xx. 170. *Tally v. Thompson*, xx. 277. *Harvey v. Wickham*, xxiii. 112. *Hockaday v. Sallee*, xxvi. 219.

34. And the property of the wife is not exempt from liability for debts contracted by the husband after the property has come into the possession of his wife. *Barbee v. Wimer*, xxvii. 140.

35. Where land purchased with the money of the husband is conveyed in trust for the separate use of the wife, with intent to hinder and defraud the creditors of her husband, it is subject to sale on execution issued under judgments in favor of such creditors. *Eddy v. Baldwin*, xxiii. 588.

See HUSBAND AND WIFE, 32; . . . INFRA, 65.

VI. WHAT IS AND WHAT IS NOT SUBJECT TO EXECUTION.

36. An improvement on public land is not subject to sale on execution. (See R. S. 1835, 256, § 17.) *Hatfield v. Wallace*, vii. 112.

37. The bare possession of a chattel by a mortgagor, with the consent or permission of the mortgagee, and determinable at his will, is not the subject of sale under execution. *King v. Bailey*, viii. 332.

38. A mortgagor or pledgor of personal property in the possession of the mortgagee or pledgee, has no interest therein subject to sale on execution. *Sexton v. Monks*, xvi. 156.

39. A., having purchased a tract of land, got a bond for title upon payment of the purchase money. He then sold his right and transferred the title bond to B.—*Held*, that A. has no interest in the land which is subject to execution. *Broadwell v. Yantis*, x. 398. See *Lumley v. Robinson*, xxvi. 364.

40. But under the statute, (R. S. 1845, 478, § 14, cl. 5,) a court of equity will recognize an interest in the land in the purchaser, that may be sold on execution. It is otherwise, however, where, by the agreement, no money has been paid by him who may become the purchaser, and he is not under any obligation to pay. *Brant v. Robertson*, xvi. 129.

41. But after a tender of the purchase money, he has an interest in the land subject to execution. *Anthony v. Rogers*, xvii. 394.

42. By the territorial law, (1 Ter. L. 23, § 10,) unconfirmed land titles were subject to sale under execution. *Landes v. Perkins*, xii. 238.

43. At common law, an equitable interest in chattels could not be sold on execution, and this principle has been sanctioned by the statute. *Yeldell v. Stemmons*, xv. 443. *Boyce v. Smith*, xvi. 317.

44. The statute expressly subjects equitable interests in lands to sale, but not equitable chattel interests. At law, after forfeiture, the mortgagor has no interest in the chattels mortgaged. The right of redemption is a mere chose in action, not the subject of levy and sale. But the creditor is not without redress; he may, by suitable proceedings, ascertain the precise interest his debtor has in the property, and then subject it to sale, when there can be no sacrifice. *Ibid*.

45. A resulting trust is liable to be seized by the creditors of the *cestui que trust*. *Rankin v. Harper*, xxiii. 579.

46. One Lowe was indebted to the plaintiff and others in the sum of \$4,500, and assigned to him, in trust, certain notes against O. and R., as collateral security therefor. By a subsequent arrangement between all the parties, O. conveyed to Lowe certain lands, in consideration of a credit of \$3,500 on O. and R.'s notes, and Lowe at the same time conveyed the same land in trust to the plaintiff to secure the \$4,500, who afterwards sold it and became the purchaser under the deed of trust for a sum less than the debt. Between the time of making the foregoing arrangement and its final consummation, the defendant recovered a judgment against Lowe, and levied his execution on the above mentioned land—*Held*, that since the land did not sell for enough to satisfy the deed of trust, Lowe had no interest in it subject to execution; and that although nothing would pass by sale under the execution, still the court would not enjoin such sale. *Drake v. Jones*, xxvii. 428.

47. Where a father, being in failing circumstances, purchases land, and causes the title to be vested in a third person in trust for his own children, with a view to defraud his creditors, there will be a resulting trust to himself for the benefit of his creditors, which interest may be seized and sold on execution under a judgment against him in favor of one of these creditors. *Herrington v. Herrington*, xxvii. 560.

See *INFRA*, 95; . . . *MECHANIC'S LIEN*, 29; . . . *MORTGAGE*, 65.

VII. LIEN.

48. An execution is not a lien on defendant's personal property after it has been returned by order of plaintiff's attorney. *Brown v. Sheriff*, i. 154.

49. The lien of an execution in the hands of the sheriff, the levy of which is directed to be stayed by the plaintiff, is destroyed as to executions subsequently coming to the hands of the sheriff, and the latter will be first satisfied. *Wise v. Darby*, ix. 130.

50. So where there has been a levee, and the proceedings are then stayed by plaintiff. *Per* NAPTON, J. *Ibid*.

51. Where there are two executions against the same defendant, the lien of the executions, as between the execution creditors, attaches from the levy, and not from the time at which they went into the hands of the officer. *Per* McBRIDE, J. *Field v. Milburn*, ix. 488.

52. Where an execution is issued upon a judgment, and levied while the judgment is a lien upon real estate, the lien and its priority are continued until the writ is executed, although the period during which the judgment is a lien should in the meantime expire. *Bank of Missouri v. Wells*, xii. 361.

53. An execution issued under a judgment against one of several partners, will be a lien on such partner's interest from the time of its delivery to the officer. *Wiles v. Maddox*, xxvi. 77.

See LIEN, 11.

VIII. TRIAL OF THE RIGHT OF PROPERTY.

54. Where execution issues in an attachment case for the sale of the property attached, the sheriff has no right to try the right to the property, but must sell. (R. S. 1825, 149, § 10.) *Mitchel v. Gregg*, iv. 37.

55. No appeal lies from the determination of a jury summoned by the constable to try the right of property between the execution debtor and the claimant. The only effect of the decision of the jury is to justify the constable in selling. *Per* TOMPKINS, J. *Little v. Seymour*, vi. 166.

56. Where a constable's jury find a verdict on the trial of the right of certain property levied on by him, his authority with reference to the trial of the right of property is at an end; and a verdict on a subsequent trial is without effect, and is no protection to the constable. *Canifax v. Chapman*, vii. 175.

57. In the trial of the right of property levied on by the constable, the jury must be sworn by the constable, or some other person qualified to administer an oath. (R. S. 1835, 367, § 15.) *Brown v. Burrus*, viii. 26.

58. Where the claimant of property levied upon by the constable withdraws his claim before the trial, the authority of the constable to try the right is at an end. TOMPKINS, J., *dis*. *Ibid*.

59. In a proceeding to try the right of property between the defendant in the execution and the claimant, the verdict of the jury is a full protection to the officer, as well against the plaintiff in the execution as the claimant. The plaintiff

cannot compel the officer to sell the property levied upon by tendering a bond of indemnity. (See R. S. 1835, 257, § 24—367, §§ 14-16.) *Fisher v. Gordon*, viii. 386. [But it is otherwise by the R. S. 1855, 743, § 30.]

60. Art. VIII of the new code relating to the claim and delivery of personal property, (Acts 1848-9, 82,) does not repeal the act relating to Justices' courts which authorizes a trial before the constable of the right of property where a third party interposes a claim. (R. S. 1845, 662, §§ 12-14.) If, on such a trial, the jury decide against the claimant, he cannot proceed against the constable, though he may against all others who have interfered with his property. *Schroeder v. Clark*, xviii. 184.

61. Where a constable had seized goods on execution to which another party interposed a claim, and the jury summoned to try the right of property found that the goods belonged to the plaintiff in the execution, the verdict, though informal, will justify the officer in selling. *Ibid.*

62. A delivery bond given for property seized under execution, does not take away the trial of the right of property when a claim is interposed, nor the power of plaintiff by giving a bond of indemnity, to compel the officer to sell, notwithstanding a verdict for the claimant. *Waterman v. Frank*, xxi. 108.

See ATTACHMENT, XIII; . . . COSTS, 40.

IX. INDEMNIFYING AND DELIVERY BOND.

63. Where a defendant in an execution gives a bond for the delivery of property on the day of sale, and fails to comply with its conditions, and the value of the property is less than the debt, the judgment against him and his securities should be for the value of the property and ten per cent. damages. But where the value of the property is greater than the debt, the judgment should be for the debt and ten per cent. damages. If a part of the property be delivered, whatever amount is made by the sale of it should be credited upon such judgment. *Lee v. Moore*, xii. 458.

64. If the claimant of property levied on becomes a party to a bond for its delivery, he can only avail himself of his claim by complying with the conditions of the bond and then making his claim to it. If he suffers a forfeiture, he can not avoid the consequences of it by a future successful assertion of his claim. *Page v. Butler*, xv. 73.

65. A bond exacted by a sheriff, to compel the delivery of property levied upon which is exempt from execution, is void, unless the defendant, either by act or omission, waives his rights. *Robards v. Samuel*, xvii. 555.

66. A delivery bond, although given by a party other than the defendant in the execution, and made payable to the officer instead of the plaintiff, is good as a common law bond, although, not being in conformity with the statute, it would not authorize the summary statutory proceedings. *Waterman v. Frank*, xxi. 108.

67. In a suit upon a forfeited delivery bond, given by the claimants of property seized under execution against another, the defendants cannot be permitted to show in mitigation of damage that the property belonged to them. *Ibid.*

68. Goods were levied on by the sheriff under execution, and advertised to be sold. On the day of sale, by agreement of the parties, a bond was executed by the defendant with sureties to the plaintiff, for the delivery of the goods at a future day—*Held*, that this was not a statutory bond within the meaning of the act relating to executions, (R. S. 1845, 482, § 31,) and could not be enforced as such by a mere motion. *Selmes v. Smith*, xxi. 526.

69. The only objection that can be entertained by the court, under the statute, (Acts 1854-5, 465, § 7,) to an indemnifying bond demanded by the sheriff, is as to the sufficiency of the security. It cannot be objected that the penalty is insufficient. The action of the court under § 8 is not conclusive on the claimant as to any other valid objection to the bond. *Cochran v. Goddard*, xxvii. 500.

See *INFRA*, 129 ; . . . *SUPRA*, 59, 62.

X. SALE.

a. NOTICE.

70. Sales under execution will not be set aside because the property was advertised for sale on two different days, by different sets of advertisements, it appearing that such second advertisement was induced by an additional levy. *McDonald v. Cook*, xi. 632.

71. The notice of execution required to be given to a judgment debtor, residing out of the county, by the act of March 12, 1849, (Acts 1848-9, 52,) need not be given, where mortgaged land is to be sold under a special *fi. fa.* *Hobein v. Murphy*, xx. 447. *Hobein v. Drewell*, xx. 450.

72. And the omission to give the required notice of execution, even where necessary, would not render the sale *ipso facto* void ; but the party injured might obtain relief against the party who neglected his duty, if he became the purchaser, by setting aside his titles, or by recovering of him pecuniary damages, if a fair purchaser had paid the price and received a conveyance. *Hobein v. Murphy*, xx. 447.

See *INFRA*, 75, 97.

b. TIME AND MANNER OF SALE.

73. A sheriff advertised real and personal estate for sale on execution during the session of the Circuit Court next to be held in his county. The court met and adjourned at an unusually early hour on the first day of the session—*Held*, a sufficient excuse for the sheriff's failure to sell. *Mitchel v. Gregg*, iv. 37.

74. The 13th section of the act of February 21, 1825, (R. S. 1825, 367,) which provides for the division of real estate levied upon and sold by the sheriff, is merely directory. A violation of its injunctions will not make a sale void, although it may be good cause for setting it aside. *Rector v. Hartt*, viii. 448. See *INFRA*, 95.

75. Where a purchaser at a sheriff's sale refuses to pay for property struck off to him, the sheriff, under the statute, (R. S. 1845, 483, §§ 40-42,) may sell again without further notice. *Illingworth v. Miltinberger*, xi. 80.

76. The fact that a sheriff sold at an earlier hour in the morning than is usual for making sales, would not invalidate a sale, if legally conducted in other respects. *Hammond v. Scott*, xii. 8.

77. A sale by a sheriff, under an execution, of an undivided and unknown interest in two adjoining tracts of land, at the same time, is valid. *Ibid.*

C. CONSIDERATION.

78. Inadequacy of price is not, of itself, sufficient ground for setting aside a sheriff's sale of real estate. *Ibid.*

79. But where the inadequacy is gross, the proceedings must be strictly regular. Thus where real estate, consisting of two parcels, worth \$4,000, was struck off to the plaintiff in the execution, one lot for five dollars and the other for seven dollars, "or as much as the expenses of the sale, together with the clerk's fees for issuing the execution, would amount to," it being understood between the sheriff and the bidder that the amount should be increased or lessened to the amount of the expenses of the sale including the clerk's fees, and it not appearing that the defendant was privy to the levy or sale, such sale and the sheriff's deed thereunder, will be set aside for irregularity. *Nelson v. Brown*, xxiii. 13.

D. DESCRIPTION.

80. H. was the owner of twelve and one-half arpents of land adjoining the city of St. Louis, and laid the same off into town lots and sold six of the lots to P., who had formerly owned the whole tract. The sheriff levied upon the entire parcel under an execution issued on a judgment obtained against P., after H. became the owner of the land, and sold the same and executed his deed of conveyance, in which he described the land sold thus: "twelve and one-half arpents adjoining St. Louis," &c. At the time of the sale, P. was interested in only the six lots—*Held*, that the sale and conveyance by the sheriff of P.'s interest in the tract was void for uncertainty of description. *Evans v. Ashley*, viii. 177.

81. The plaintiff was the owner of a quarter section of land, except one lot, ninety by one hundred and fifty feet, about twenty-five acres of which was laid off into forty-eight town lots. The streets and alleys were unopened, designated by no monuments, and covered with brush and timber, with a single highway through the tract. Under an execution issued on a judgment against the plaintiff, the sheriff levied upon the whole quarter section, describing it as the N. W. fr. qr. sec. 35, T. 49, R. 17, and sold the whole tract by such description—*Held*, that the description was sufficiently certain, and that the case was clearly distinguishable from the case of *Evans v. Ashley*, viii. 177. *Rector v. Hartt*, viii. 448.

82. The fact that a part of the description set forth in an advertisement for the sale of land under execution is false, will not vitiate the sale, if the premises are otherwise certainly described. *Landes v. Perkins*, xii. 238.

83. At a sheriff's sale the description was "the one undivided third part of the lots which were not sold by said L. in the addition to the then city of St. Louis, laid out by said L., S. and B., on the river," &c. It was proved that the

addition was well known, and that only one lot had been sold before the death of L.—*Held*, that the description was sufficient. *Lisa v. Lindell*, xxi. 127.

e. VALIDITY.

84. Where more property is sold on an execution than is requisite for its satisfaction, the sale having been made in a mass when it might have been made in parcels, the court will set aside the sale, on motion of a party whose rights are affected thereby. *Hicks v. Perry*, vii. 346.

85. A sale under a satisfied judgment, is void only against the purchaser with notice. *Reed v. Austin*, ix. 713.

86. A sale under a voidable judgment, cannot be impeached in a collateral proceeding. *Ibid*.

87. So irregularities in a sheriff's sale can only be corrected by a direct application for that purpose. *Ibid*.

88. An execution, issued within a period forbidden by law, on a judgment lawfully rendered in a court of general jurisdiction, is not void but only voidable. *Carson v. Walker*, xvi. 68.

89. And where the execution was issued and the land advertised for sale within the time forbidden, and the sale took place after the lapse of that time, the sale is valid. *Ibid*.

90. A sale of real estate under execution after the death of the defendant, the levy having been made before his death, is not void, but at most only voidable. (This case arose under the law as it stood before 1845.) *Mundy v. Bryan*, xviii. 29.

91. Where in a suit commenced by attachment, there is a personal service upon the defendant, and a general judgment rendered against him, such judgment and a sale on execution under it are not rendered void by the fact that the affidavit upon which the attachment issued may have been defective. *Harvey v. Wickham*, xxiii. 112.

f. FRAUD.

92. A sheriff's sale under execution may be shown to be fraudulent, and that there was a secret trust in favor of the defendant, with the consent of the purchaser. *Per Scott, J. Dallam v Bowman*, xvi. 225.

See FRAUD, 12, 13 ; . . . SALE, 22.

g. TITLE ACQUIRED UNDER.

93. Where property purchased fraudulently at a sheriff's sale, passes from such fraudulent purchaser into the hands of a *bona fide* purchaser, for value, without notice, the title of such innocent purchaser is good, and the party injured has his remedy against the sheriff. *Kean v. Newell*, i. 754.

94. A sale made by a sheriff of a chattel conveys a good title to the purchaser, unless there was fraud, and the purchaser participates in it. Although the property is not present at the time of the sale, a good title is acquired. *Ibid*.

95. Both parties claimed title under one Price, against whom the defendant gave in evidence three judgments rendered by the Supreme Court in 1821,

affirming judgments below, and giving judgment for costs, on which executions issued, and the sheriff sold upon them the land in dispute to one R., giving him a certificate of the sale, as required by the act of 1821, and stating therein that R. would be entitled to a deed in two years and a half, unless the premises should be previously redeemed by Price or his creditors. In 1826, C. and P., (one of whom was a judgment creditor,) redeemed the land with money furnished by Price, and the sheriff made his deed to them. The plaintiff claimed under a subsequent sale of the same property by the sheriff—*Held*, that the fact of the constitutionality or unconstitutionality of the act of 1821, allowing three years' redemption of land sold on execution, (1 Ter. L., 778,) did not affect the defendant's title, since, if the law were unconstitutional, the sale to R. was absolute, and the substitution of C. & P., with his consent, unobjectionable; that it was no objection to the sheriff's certificate that it was signed by a deputy, as it was expressed in the body to be the act of the sheriff, and commenced in his name, nor was it invalidated by stating the time of redemption at two and a half instead of three years, as limited by the statute;—(OVERRULED in *Evans v. Wilder*, vii. 359, and *Evans v. Ashley*, viii. 177, it there being *held* that such a certificate, signed by the deputy sheriff, is void,)—that only one of R.'s grantees (C. and P.) was a judgment creditor was immaterial; that as the property was redeemed with Price's money, he had a resulting interest in it which could be taken on execution, subject to the claims of C. and P., and that it vested in the plaintiff's grantor; that the validity of the sheriff's sale was not affected by the fact that the land was sold in a body, and not in parcels; the objection that there were no judgments, should have been taken on the return of the executions; the judgments of the Supreme Court were at least good for costs. *Evans v. Wilder*, v. 313.—*Held*, also, that the certificate of sale did not authorize the sheriff's successor to execute a deed of the property, since that could only be done by petition to the Circuit Court. The repealing act of June 11, 1822, (1 Ter. L. 862,) saves alone such rights as had been acquired under the act of 1821. *Same case*, vii. 359. *Evans v. Ashley*, viii. 177.

96. The title of a *bona fide* purchaser at a sheriff's sale cannot be declared void in a collateral proceeding, on account of an error or irregularity in the judgment or execution. *Landes v. Perkins*, xii. 238.

97. A purchaser at a sheriff's sale is not affected by any error or irregularity in the judgment or other proceedings prior to the sale, unless they are of such a character as to render the whole proceeding a nullity. Such a sale to a *bona fide* purchaser is not vitiated by the omission of the sheriff to advertise the sale according to statute. *Draper v. Bryson*, xvii. 71.

98. E. executed a bond to convey to S. a tract of land, upon payment of the purchase money in four instalments. After two of the instalments were paid, E. recovered judgment for the third, and caused the execution to be levied on the land, which was sold and P. became the purchaser. E. was present at the sale and bid for the land—*Held*, that P. acquired only the interest of S., which was the right to a deed upon payment of the balance of the purchase money. *Phillips v. Edmonson*, xvii. 579.

99. A. obtained a judgment against B. and C. in a Justice's court, upon which

an execution was issued and returned *nulla bona*, as to one of the defendants, but as to which it did not appear, nor did it appear against which of the defendants it issued, nor whether it issued against both. A transcript of the judgment was filed in the Circuit Court, and an execution issued thereon, and the real estate of B. was sold at a sheriff's sale upon it—*Held*, that the purchaser acquired no title thereby. *Linderman v. Edison*, xxv. 105.

See DOWER, 31, 32 ; . . . REPLEVIN, 14.

h. DUTY OF OFFICER.

100. A sheriff, in selling property under an execution, is the agent of both plaintiff and defendant, and is bound to protect the interests of both. He is not bound to accept a bid without reserve. If it is apparent that a sacrifice of property will be prevented by a little delay, he may return "no sale for want of bidders." *Conway v. Nolte*, xi. 74.

i. NOTICE TO SET ASIDE.

101. Where land, sold at sheriff's sale, has been subsequently conveyed by the purchaser at such sale, all persons claiming title under the sheriff's sale must be notified of a motion to set it aside. It is not sufficient to notify the purchasers from the sheriff. *Clamorgan v. O'Fallon*, x. 112.

j. LIABILITY AND RIGHTS OF PURCHASER.

102. In proceedings under the statute, (R. S. 1845, 483, § 42,) against a purchaser at a sheriff's sale, who refuses to pay the amount bid by him, for the difference between his bid and the amount for which the property sold at a subsequent sale by the officer, the return of the sheriff is competent evidence. *Hensley v. Baker*, x. 157.

103. And the party has no right to have such motion tried by a jury, but the court may, in its discretion, order a jury. *Ibid*.

104. Where, at a sheriff's sale, the purchaser had until five o'clock in the afternoon to pay the money, the law requiring the sale to be before five, the sheriff had no right to re-sell a few minutes before that hour, and a tender of the money on the next morning by the first purchaser is sufficient. *Conway v. Nolte*, xi. 74.

105. The statute relating to sales on execution, (R. S. 1845, 483, § 42,) is penal in its character and to be construed strictly, and does not authorize a judgment on motion against one who has been substituted in the place of the purchaser at the sale, and who has been reported as the purchaser by the sheriff. *Wimer v. Obear*, xxiii. 242.

106. *Quære*—Whether this section embraces a sale in partition. *Ibid*.

k. WARRANTY.

107. In sheriff's sales there is no implied or express warranty of the title or soundness of the goods sold. The rule *caveat emptor*, is applied to such sales. *Hensley v. Baker*, x. 157.

I. ON EXECUTION FROM THE UNITED STATES COURT.

108. Sales made in this State by the Marshal of the United States, on executions from the U. S. Courts, are governed by the laws of this State regulating executions. (See 4 U. S. Stat. 281, § 3.) *Evans v. Labaddie*, x. 425.

109. But it is no objection to a sale made by a Marshal of the United States, prior to the act of Congress adopting the practice of the State courts, that it was not made in conformity to the law of this State regulating sales under execution. The State laws are not binding upon the officers of the Federal Government until adopted by the law of the United States, or by the rules of their courts. *Kennerly v. Shepley*, xv. 640.

III. EVIDENCE.

110. One who claims under a sale made by a sheriff under execution, must produce the judgment on which the execution issued, as well as the execution itself. *Morrison v. Dent*, i. 246.

XI. DISTRIBUTION AND APPROPRIATION OF PROCEEDS.

111. Executions in favor of A., which were issued by a justice, were levied on personal property of B. by the constable. The same property was then taken by the sheriff, on executions in his hands, and sold; not being sufficient, the sheriff also sold certain real estate of B., on which C. and D. had a mortgage, given subsequent to the issuing of the sheriff's executions. C. and D. purchased the real estate at the sheriff's sale, for an amount greater than the executions in his hands, and retained the excess—*Held*, on a bill filed by the sheriff, to compel A., C. and D. to interplead, that the justice's executions in favor of A. were entitled to be paid out of the surplus arising from the sale of the real estate in the hands of C. and D., for, although such executions were no lien on the land, they were on the personal property sold by the sheriff, and the proceeds of that sale having reduced the lien against the real estate, must be applied to their payment. *Kring v. Green*, x. 195.

112. A. brought an action against B., to recover the proceeds of a sale of land sold on an execution in favor of B. against A., issued on a judgment, which A. claimed B. had previously agreed to enter satisfied. On the trial, A. admitted that he had no title to the land—*Held*, that he could not maintain the action. *Barada v. Inhabitants of Carondelet*, xvi. 323.

XII. SATISFACTION OF EXECUTION.

113. If sufficient property is levied upon to satisfy the execution issued on a judgment, such levy is a satisfaction of the judgment. *Blair v. Caldwell*, iii. 353.

114. The levy of an execution upon property sufficient to satisfy it and the subsequent release of it, under an arrangement with the defendant, is not *per se* a satisfaction of the execution. *Williams v. Boyce*, xi. 537. *Blackburn v. Jackson*, xxvi. 308.

XIII. LIABILITY RIGHTS AND DUTIES OF OFFICER.

115. The execution is a sufficient justification of the officer in an action of trespass for levying on the plaintiff's property, but there is no objection to his giving the whole record in evidence. *Davis v. Cooper*, vi. 148.

116. An officer is bound to use reasonable diligence in searching for property of the defendant in the execution, but the mere fact that the defendant had property, will not render the officer liable, if he used reasonable diligence to discover it, and could find none. *Fisher v. Gordon*, viii. 386.

117. He cannot contradict the return of a writ made by him. A special return of facts, showing that he discharged his duty, will protect him. But in actions against him he will be confined to the facts stated in his return, and cannot show another and different state of facts in his defense. *Boone County v. Lowry*, ix. 23.

118. It is his duty to execute a writ without delay. If, by delay, he become unable to execute a writ which he might have executed, he is liable for damages. *Douglass v. Baker*, ix. 40.

119. He is not justified for failing to levy an execution in his hands, by the passage of the act abolishing imprisonment for debt, if such writ could have been executed before the passage of that act. *Ibid.*

120. In an action against a sheriff for failing to levy an execution on the body of a debtor, it is not necessary for the plaintiff to prove a demand of the money due on the execution, nor that the party has been damaged. Under the statute the officer is liable for the full amount of the execution. (R. S. 1835, 260, § 52.) *Ibid.*

121. A sheriff, who voluntarily satisfies an execution out of his own funds, cannot have another execution issued on the same judgment for the recovery of the money so paid by him. His remedy is an action for the money advanced. *Garth v. McCampbell*, x. 154.

122. A ministerial officer is not liable in trespass for executing a writ issued under the judgment of a court having jurisdiction of the person and subject matter, although the judgment be erroneous. *Aliter Per NAPTON J.*, when the execution is illegal on its face. *Milburn v. Gilman*, xi. 64.

123. Where a sheriff, having collected money on an execution, is notified by the defendant not to pay it over to the plaintiff, and a motion to that effect is made in court, he is not liable to the plaintiff for the penalty of five per centum per month, (R. S. 1845, 487, § 60,) for not paying him the money, until the decision of such motion. *Conway v. Campbell*, xi. 71.

124. The plaintiff in an execution filed a motion to compel the sheriff to pay over money collected under an execution, and for the penalty of five per cent. per month for failing to pay it on the return day. The motion being overruled, the plaintiff received the principal sum—*Held*, that the taking of the money was a waiver of the penalty. *Ibid.*

125. An execution, made returnable to a day beyond the term following its issue, is only voidable, and the officer is bound to execute it, and will be liable for the full amount of the debt if he fails to do so. *Milburn v. The State*, xi. 188.

126. But where an execution, issued by a Justice, is made returnable in sixty days, instead of ninety, as provided by the statute, (R. S. 1845, 660, § 3,) it is not merely erroneous, but absolutely void. *Stevens v. Chouteau*, xi. 382.

127. Where an execution is regular upon its face, and emanates from a court having jurisdiction of the subject, it will justify an officer in making a levy. He is not bound to go behind the writ and inquire whether the judgment upon which it issued is regular. *Higdon v. Conway*, xii. 295.

128. Where two justices of the County Court grant an injunction to stay proceedings upon an execution in the hands of a constable, and issue a writ to that effect, it will protect the constable, although the writ ought regularly to have been issued by the clerk of the Circuit Court, on the order of the justices. *The State v. Ferguson*, xiii. 166.

129. Under the statute of 1835 relating to executions, (R. S. 1835, 257, §§ 23-25,) the taking of an indemnifying bond by a sheriff does not compel him to go forward and do the act for the results of which he is indemnified. And where such a bond was given, and property not belonging to the debtor was taken and sold, it was *held*, that the plaintiff in the execution could not recover from the officer or his securities the proceeds of the sale. *Heath v. Daggett*, xxi. 69.

See SUPRA, 100; . . . TRESPASS, 9, 10.

XIV. SHERIFF'S DEED.

130. A sheriff's deed which described the land sold as "three and one-half eighths of the Boonville tract, situated in Cooper county, on the South side of the Missouri river," is not void for uncertainty. It may be shown by parol that the "Boonville tract" designated a particular parcel of land, well known in the neighborhood by that name. *Scott, J., dis.* *Hart v. Rector*, vii. 531.

131. Where a sheriff sells land on an execution, and subsequently executes to the purchaser a deed, such deed will take effect by relation as of the date of the sale, as respects parties and privies, but such relation back will not be allowed to prejudice the rights of strangers. *Alexander v. Merry*, ix. 510. *Hurt v. Rector*, xiii. 497.

132. The certificate required to be endorsed by the clerk upon a sheriff's deed, (See R. S. 1845, 485, § 51,) need only be a certificate that the deed was acknowledged; if, however, he adds a copy of the entry required to be made by him on his record, it is superfluous, and will not vitiate the acknowledgment. *Crowley v. Wallace*, xii. 143.

133. The legal effect of the delivery of a sheriff's deed is to vest the title in the purchaser by relation, from the day of the sale; and such deed is admissible in evidence to establish title at that date. *Ibid.*

134. A sheriff's deed under an execution against A., described the land conveyed as thirty feet front by one hundred and fifty feet deep, upon which A.'s house stood; bounded North by a lot owned by B., South by a vacant lot, &c. More than twenty years afterwards it appeared that A., in locating the thirty feet

originally conveyed to him, and in building his house, had encroached fifteen feet upon the lot of B., but A., and those claiming under the sheriff's deed, always remained in possession of the ground upon which the house stood. In a suit by the person claiming under the sheriff's deed, for the fifteen feet of ground immediately south of the house, it was *held*, that it did not pass by that deed, as the metes and bounds therein given were not inconsistent with the further description of the lot conveyed, as thirty feet upon which the house stood. *Mellon v. Hammond*, xvii. 191.

135. A sheriff's deed, in which the land conveyed was described as "all the right of W. in and to thirty-five acres" in a specified quarter section, with no further description, was *held* sufficient to pass the title, parol evidence being given to identify the land. Proof that W. owned and lived upon one tract containing that quantity, and owned no other in that quarter section, and that these facts were notorious, is a sufficient identification. *Bank of Missouri v. Bates*, xvii. 583.

136. A sheriff's deed which recited that the land was exposed to sale "at the court house door, in the city of St. Louis, during the — term of the — court, of —, for the year eighteen hundred and forty —," is void under the statute of 1835, relating to executions, (R. S. 1835, 258, §§ 38, 45.) *Tanner v. Stine*, xviii. 580.

137. A., owning 10,256 arpents of land, conveyed 4,000 arpents thereof to his son, and afterwards mortgaged 4,426 arpents, which was described as the residue of his interest in the tract. By a sheriff's deed, afterwards executed, was conveyed all his interest in the whole tract, "except 4,426 arpents sold at sheriff's sale at the last term of the Circuit Court of St. Genevieve." Of this sale there was no evidence—*Held*, that the sheriff's deed conveyed no interest in the tract covered by mortgage. *Chouteau v. Burlando*, xx. 482.

See CHANCERY, 76-79; . . . EVIDENCE, 53-56; . . . FRAUDS AND PERJURIES, 12-15.

XV. RETURN.

138. Where a constable fails to return an execution, he is liable to the penalty of one hundred per cent. per annum until the money is paid, (R. S. 1845, 666, § 26.) *The State v. McLernan*, x. 780.

139. A return in these words, "not levied for want of sufficient goods and chattels," is, *prima facie*, sufficient. *The State v. Steel*, xi. 553.

140. Want of health is no excuse for a failure on the part of a constable to return an execution within the time prescribed by statute. *Campbell v. Luttrell*, xiii. 27.

141. The filing of a writ of execution without any indorsement upon it showing the manner in which it has been executed, does not amount to a return of the writ. *Nelson v. Brown*, xxiii. 13.

142. An execution, issued by a Justice, cannot regularly be returned before the day on which it is made returnable by statute. An execution, issued by the clerk of the Circuit Court on the transcript of a Justice's judgment, before the

return day of the original execution issued by the Justice, should, on motion, be quashed. *Dillon v. Rash*, xxvii. 243.

See SUPRA, 125, 126.

XVI. WRIT AS EVIDENCE.

143. An execution cannot be received in evidence to show title in one claiming under it, unless the judgment on which it was issued be proved. *Ramsey v. Waters*, i. 406.

144. In an action against the sheriff for attorney's fees indorsed on an execution, the execution is admissible as evidence against him, although the indorsement was joint for the benefit of the plaintiff and another. *Evans v. Hays*, ii. 97. See EVIDENCE, 66.

See ADMINISTRATION, 33, 34; . . . ATTACHMENT, 45; . . . ERROR, 6; . . . HUSBAND AND WIFE, 125; . . . LAWS, 76, 77; . . . PLEADING, 63, 64; . . . PRACTICE IN SUPREME COURT, X; . . . TRESPASS, 9, 10.

FEES.

I. SHERIFF.

II. REGISTER OF LANDS.

III. COLLECTOR.

I. SHERIFF.

1. A sheriff is not entitled, as against the defendant in an execution, to commissions on the amount of the execution, unless the money is collected by him, as where the money is paid over to the plaintiff, or the judgment is otherwise satisfied. *Gordon v. Maupin*, x. 352. *Irwin v. Milburn*, x. 456. •

2. Under the statute relating to fees, (R. S. 1845, 497, § 11,) a sheriff cannot claim *per diem* for both the attendance of himself and his deputy upon the same court. *Crouch v. Plummer*, xvii. 420.

II. REGISTER OF LANDS.

3. The third section of the act of February 27, 1843, concerning fees of the Register of Lands, (Acts 1842-3, 106,) is not inconsistent with the 32d section of

another act of February 27, 1843, (Acts 1842-3, 142.) The former act refers to those fees only which were allowed the Register by the act of February 3, 1841, (Acts 1840-1, 119, §§ 12, 13,) therefore, the Register is entitled to fees allowed him in said 32d section, and the Auditor may draw his warrant in favor of the Register for the fees allowed him under this section, as the services are rendered. *Heard v. Baber*, viii. 142.

III. COLLECTOR.

4. Under the statute of 1845 providing for levying, assessing and collecting the revenue, (R. S. 1845, 953, § 22,) the collector is entitled to a fee of twenty-five cents for each tract of land or town lot bid in by him for the State at the sale for taxes. *Ex parte Tate*, ix. 660.

See ATTORNEY AT LAW, VI; . . . CIRCUIT ATTORNEY, II; . . . ST. LOUIS, XI.

FERRY.

I. IS A FRANCHISE.

II. PRIVILEGE GRANTED TO CORPORATION TO LICENSE.

III. RIGHTS OF TENANTS IN COMMON.

IV. FERRYMAN LIABLE AS COMMON CARRIER.

V. PARTIES TO ACTION FOR INJURIES TO FERRY.

VI. INDICTMENT FOR KEEPING WITHOUT LICENSE.

I. IS A FRANCHISE.

1. A ferry is a franchise derived from the license of the County Court, under the statute, and is not an incident to the land. *Stark v. Miller*, iii. 470.

II. PRIVILEGE GRANTED TO CORPORATION TO LICENSE.

2. Where a city charter gives the power to license and tax ferries within the city limits, the right of the State to license and tax the same is not thereby taken away, unless the right of the city is expressed to be exclusive. *Harrison v. The State*, ix. 526.

III. RIGHTS OF TENANTS IN COMMON.

3. A. and B. owned a ferry in common, with an agreement that each should be entitled to one-half of the proceeds after paying all expenses, B., in good

faith, and for a valuable consideration, leased the ferry to C., without the consent of A.—*Held*, that A. could not recover of B. one half the proceeds received by C., but only one-half the rent reserved by B. *Rogers v. Penniston*, xvi. 432.

IV. FERRYMAN LIABLE AS COMMON CARRIER.

4. A ferryman is a common carrier, and is liable as such. *Pomeroy v. Donaldson*, v. 36.

V. PARTIES TO ACTION FOR INJURIES TO FERRY.

5. Redress for injuries done to the legal rights of a lessee of a landing adjoining a ferry, must be sued for in his name, and not in the name of the lessor. *Stark v. Miller*, iii. 470.

VI. INDICTMENT FOR KEEPING WITHOUT LICENSE.

6. An indictment for keeping a ferry without a license must allege on what stream or river the ferry was kept. *Wheat v. The State*, vi. 455.

7. It is not necessary for the State, on the trial of an indictment for keeping a ferry without a license, to show that the defendant had no license. It is for the defendant to show affirmatively that he had a license. *Ibid.* See CRIMINAL LAW, 210–212.

See APPEAL, 24;....COSTS, 32;....ST. LOUIS, VII.

FIXTURES.

1. Things personal in their nature may become a part of the realty, either by incorporating them with the realty as a part thereof, for some permanent object, or by affixing them to the realty, for any object, in such a manner that they can not be severed without dilapidation or injury to the inheritance. *Hunt v. Mulvanphy*. i. 508.

2. Where property which is personal in its nature is claimed as belonging to the freehold, the party claiming it must show that its character has been changed by some facts and circumstances which will clearly prove the intention of the owner thus to change it. *Ibid.*

3. As between grantor and grantee in a deed of real estate, what will pass as realty must depend upon the intention of the parties, to be gathered from their deed. If the grantee claims anything which is, in its character, personal, he must show that it was differently considered in the deed. *Ibid.*

4. A kettle, put up in a tannery, in brick and mortar, which may be removed

without dilapidating the building, will not pass as a part of the realty under a deed conveying simply a lot of ground. *Ibid.*

5. Where P. sells and conveys to M. a lot of ground, with the appurtenances, on which there is a brewery and malt-house, no mention being made of the brewery in the deed, and M. thereupon leases the ground and brewery to P., and P. covenants to keep in repair the buildings, vessels, tubs, fixtures and other articles now on said demised premises, and which are used and employed in the brewing business, and to surrender the same at the expiration of the lease, and there is this further proviso, that "it is understood that none shall be surrendered by the said P. but those which are fixtures properly so called and included in the assignment of conveyance heretofore made by the said P. to the said M."—*Held*, that the tenant had no right to remove a set of rollers and a frame set up in the malt-house, and a part of the machinery of the same, which were so set up at the dates of the sale and the lease. They are fixtures within the meaning of the proviso. *Philipson v. Mullanphy*, i. 620.

6. A still, set in a furnace in the usual way for making whiskey, is personal property, and not a fixture. *Burk v. Baxter*, iii. 207.

7. Sheds erected upon posts set in the ground by a tenant, for the purpose of making brick, are fixtures; and although they may be liable to be removed by the tenant during the lease, vest in the landlord on its termination. *Beckwith v. Boyce*, ix. 556.

8. Personal property which is necessarily connected with the freehold by a tenant, for the purpose of carrying on the business for which it has been demised to him, (such as a hydraulic press used by a tallow chandler, let into the ground and walled up with solid masonry, the wooden portion of which was nailed partly to the floor and partly to the rafters of the building,) does not thereby attach to the realty, but remains the chattel of the outgoing tenant, and may be removed by him at the termination of his lease. *Finney v. Watkins*, xiii. 291.

9. Pipes for conducting water through the apartments of a dwelling, and the bathing apparatus connected therewith, are fixtures, as between vendor and vendee. *Cohen v. Kyler*, xxvii. 122.

10. It is a mixed question of law and fact whether particular things are fixtures or not, and the jury should be guided to a determination of the question by an explanation of the legal meaning of the term. *Grand Lodge v. Knox*, xxvii. 315.

See DAMAGES, 5.

FORCIBLE ENTRY AND DETAINER.

I. WHEN AND BY WHOM THE ACTION MAY BE MAINTAINED—AND HEREIN OF POSSESSION.

II. COMPLAINT.

III. JURISDICTION.

IV. CERTIORARI AND APPEAL.

V. RECOGNIZANCE ON APPEAL.

VI. DAMAGES.

VII. EVIDENCE OF TITLE.

VIII. VERDICT.

I. WHEN AND BY WHOM THE ACTION MAY BE MAINTAINED—
AND HEREIN OF POSSESSION.

1. The terms "lawful possession," as used in the statute, (R. S. 1835, 280, § 18,) are equivalent to peaceable possession, as distinguished from possession which is actually and in point of fact tortious. *Michau v. Walsh*, vi. 346.

2. In order to constitute such a possession as will sustain an action of forcible entry and detainer, it is not necessary that the party should stand on the land or keep a servant or agent there. Any act done by him on the premises, indicating an intention to hold the possession to himself, is sufficient to give him actual possession. *Bartlett v. Draper*, xxiii. 407.

3. The statute applies to cases where the plaintiff has once been in lawful possession, and parted with it to the defendant or those under whom he claims, who hold over after a written demand. A purchaser at a sheriff's or trustee's sale who has never been in possession, cannot therefore maintain the action. *Blount v. Winright*, vii. 50. *Hatfield v. Wallace*, vii. 112.

4. Nor can the assignee or vendee of a landlord maintain such action against the tenant; nor can a devisee maintain such action against the tenant of the testator. *Holland v. Reed*, xi. 605. *Picot v. Masterson*, xii. 303.

5. Nor can a vendee maintain such action against his vendor for a refusal to deliver up the premises sold at the time agreed upon. *Wood v. Dalton*, xxvi. 581.

6. In an action of forcible entry and detainer, by a settler on lands of the United States, against one who had settled on an unenclosed part of the tract in controversy, the bare possession of the plaintiff, without any right of pre-emption, will not bring him within the provisions of the statute. (R. S. 1835, 281, §§ 28, 29.) *Sloane v. Moore*, vii. 170.

7. The possession of a part of a tract of land is the possession of the whole where the one in possession is the owner of the whole tract, but it is otherwise as regards a mere trespasser. *Kincaid v. Logue*, vii. 166. *Packwood v. Thorp*, viii. 636.

8. Where a person in possession of premises sells them and removes from the house, and delivers the keys to his vendee with the intention of giving him possession, such acts constitute a delivery of possession, and will enable the vendee to maintain an action of forcible entry and detainer against an intruder. *Hoffstetter v. Blattner*, viii. 276.

9. In an action of forcible entry and detainer, the plaintiff proved that he had been in possession of the premises in dispute, and had delivered possession thereof to one L. to keep for him; that he afterwards found the defendant in possession, who refused to surrender the same to the plaintiff. The plaintiff

then offered to prove that the defendant had paid L. thirty dollars to deliver possession to him—*Held*, that the evidence was properly excluded. *Moore v. Agee*, vii. 289.

10. One tenant in common of land may oust his co-tenant and hold adversely to him. *Hoffstetter v. Blattner*, viii. 276.

11. In an action for forcible entry and detainer, it is competent for the plaintiff, in establishing his possession, to prove by his agents and by letters bearing his name, received by them from him in the usual course of the mail, their possession in his behalf. *Julian v. Lacey*, xiv. 434.

12. If, in a complaint for the recovery of premises held over after the termination of a lease, the plaintiff describes himself as administrator, he cannot recover unless he shows a demise by himself to the defendant. A demise by his intestate will not sustain the complaint. *Holliday v. Doyon*, xv. 407.

13. A tenant may maintain an action of forcible entry and detainer against his landlord, although at the time of the entry the tenant was holding over. *Krevet v. Meyer*, xxiv. 107.

14. A person in possession at the commencement of an action of ejectment, to which he is not made a party, cannot be dispossessed by virtue of a writ of possession issued upon a judgment for the plaintiff in such suit. And if in the execution of such writ such person is dispossessed, and possession is given to the plaintiff, and the person dispossessed returns to the possession, the plaintiff will not thereby acquire such possession as will entitle him to sustain an action of unlawful detainer against such person. *Garrison v. Savignac*, xxv. 47.

15. Where one having title to land and right of entry enters thereon forcibly, the common law affords no civil remedy to the party dispossessed; he must resort to the statutory remedy of forcible entry and detainer. *Fuhr v. Dean*, xxvi. 116.

16. Where in an action of unlawful detainer, the defendant admits that he is in possession of the premises under a lease from the plaintiff, who is a negro, he cannot avail himself of the presumption that the plaintiff is a slave, and consequently incapacitated to make a lease or to maintain such a suit. *Helmes v. Stewart*, xxvi. 529.

17. To maintain the action of forcible entry and detainer the plaintiff must be entitled to the possession of the premises in controversy. *Reed v. Bell*, xxvi. 216.

18. An action of unlawful detainer cannot be maintained in the name of one person to the use of another. It can only be maintained in the name of the person entitled to possession. *Ferguson v. Lewis*, xxvii. 249.

19. Where a wrongful entry has been made on premises in the possession of a tenant, he, and not the landlord, is the proper person to institute the action of forcible entry and detainer. *Burns v. Patrick*, xxvii. 434.

20. Under the statute, (R. S. 1835, 277, § 2,) a mere entry upon land, and cutting timber, is not of itself sufficient to sustain an action of forcible entry and detainer. *Rouse v. Dean*, ix. 298.

21. Where the plaintiff had been in possession of premises for several years, under a claim of title, and had made improvements thereon, and the defendant, subsequently, got into possession of the same premises, but how or by what means did not appear—*Held*, that the entry of the defendant was a disseizin, and

would, under the statute, (R. S. 1845, 512, § 3,) sustain an action of forcible entry and detainer. *Warren v. Ritter*, xi. 354.

22. An entry upon real estate, against the will of a party in possession, is forcible, and the subsequent detainer unlawful, although the entry was without actual force. *Cathcart v. Walter*, xiv. 17. *Dennison v. Smith*, xxvi. 487. *Wunsch v. Gretel*, xxvi. 580.

23. A person in possession of real estate, under a parol contract of purchase, receiving notice to quit on the same day, but before the service of a summons upon him, is not guilty of an unlawful detainer, in holding over. *Young v. Ingle*, xiv. 426.

24. In an action of forcible entry and detainer, where the defense relied on is that the entry complained of was made after an abandonment of the premises by the plaintiffs, evidence that previous to the alleged abandonment and the forcible entry complained of, the plaintiffs, then being tenants of W. C., (claiming under whom the defendants made their entry,) fraudulently attorned to one J. M., is inadmissible. *Keyser v. Rawlings*, xxii. 126.

25. A. leased to B. the third story of a house, with the proviso that if at any time before the expiration of the lease he could lease the whole house, then B.'s lease should become void. A. leased the whole house to C., before the expiration of B.'s lease, and B. refused to deliver up possession—*Held*, it not appearing that C. had made his election to sue his landlord, A., for the non-delivery of the premises leased, or to bring ejectment against B., the first lessee, that an action for unlawful detainer would not lie. LEONARD, J., *dis*. *L'Hussier v. Zallee*, xxiv. 13.

26. Where a tenant invites and consents to the entry of a person upon the premises occupied, such entry is not "wrongful without force by disseizin," as against the landlord, within the meaning of the statute. (R. S. 1855, 787, § 3). *Reed v. Bell*, xxvi. 216.

27. If a tenant holds over the premises demised with the acquiescence of his landlord, he is not guilty of an unlawful detainer. *Ish v. Chilton*, xxvi. 256.

28. The term "disseizin," as used in the statute, (R. S. 1855, 787, § 3,) is not technical in its meaning, but applies to any entry, which is wrongful and without force upon the actual possession of another. *Spalding v. Mayhall*, xxvii. 377.

See ACTION, 56, 57; . . . INFRA, 45.

II. COMPLAINT.

29. In forcible entry and detainer, it is sufficient to describe the premises as "one house and one garden." *Tipton v. Swayne*, iv. 98.

30. A forcible detainer must be alleged in the complaint as well as a forcible entry. *Ibid*.

31. A complaint, alleging a forcible detainer on a certain day within three years before suit, is sustained by evidence of a detainer on any day within that time. *Warren v. Ritter*, xi. 354.

32. A complaint alleged that the plaintiff was entitled to the immediate possession of certain premises, and that the defendant unlawfully detained said pre-

mises—*Held*, that such complaint was insufficient under the act relating to forcible entry and detainer. *Andrae v. Heinritz*, xix. 310.

33. Section 6 of the statute (R. S. 1855, 788,) regulates the form and substance of the complaint in an action of forcible entry and detainer. *Ish v. Chilton*, xxvi. 256.

34. And a complaint under this section, in these words, is sufficient: "Plaintiff states that defendant unlawfully detains from him a tract of land belonging to plaintiff (describing it); that said farm belongs to plaintiff, and the defendant wrongfully and unlawfully detains the same from plaintiff, and has since the first day of March, 1856; that said premises are worth twenty dollars per month." *Ibid*.

III. JURISDICTION.

35. A. brought an action of forcible entry and detainer against B., in the township of C., and the cause, on motion of A., was removed to another township in the same county—*Held*, there was no error in the removal of the cause, since the jurisdiction of the justice was co-extensive with the county. (See R. S. 1835, 278, § 5—348, § 6.) *Keim v. Daugherty*, viii. 498.

IV. CERTIORARI AND APPEAL.

36. On a *certiorari* issued by the Circuit Court under the statute, (R. S. 1825, 398, § 11,) the Circuit Court will look only to the record of the Justice, and set aside their proceedings for irregularity; but the Circuit Court will not correct the errors in law of the Justice; and in setting aside the proceedings of the Justice, the Circuit Court has no authority to remand the cause for further proceedings, the functions of the Justice having ceased. *Sholar v. Smyth*, iii. 416.

37. In an action under the statute for an unlawful detainer before two Justices, the evidence given or rejected, or the decisions of the Justices thereon, form no part of the record or proceedings subject to be reversed by the Circuit Court when brought there by *certiorari*. *Hicks v. Merry*, iv. 355.

38. Under the statute, (Acts 1838-9, 46, § 1,) the proceedings may be removed to the Circuit Court by *certiorari*, after the return day of the writ, where the cause stands adjourned for trial. *Kincaid v. Mitchell*, vi. 223.

39. The statute (Acts 1838-9, 48, § 27,) makes it the duty of the appellant to file the transcript of the Justice's proceedings, on or before the return day of the appeal, and his failure to do so gives the appellee the right to produce the transcript, and have the judgment of the Justice affirmed. And where the judgment is thus affirmed, a writ of restitution may be issued from the Circuit Court. *Keim v. Daugherty*, viii. 498.

40. Where judgment by default has been rendered against the defendant, he will not be entitled to an appeal, although he first moves to set aside the judgment by default, and such motion is overruled. (See Acts 1838-9, 47, § 11.) *Ser v. Bobst*, viii. 506.

41. But where, in such case, the appeal has been allowed by the Justice, the cause will not be dismissed if the judgment against the appellant was improperly given, as where he has not been served with process as the law requires. In such case it is the duty of the Circuit Court to try the cause *de novo*, without regarding any error or imperfection in the proceedings before the Justice. *Ser v. Bobst*, viii. 506.

V. RECOGNIZANCE ON APPEAL.

42. Where the affidavit and recognizance taken on an appeal are defective, the appellant may file a sufficient recognizance and affidavit, within such time as will not delay the other party, and it is error for the court to refuse it to be done. *Hamilton v. Jeffries*, xv. 617.

43. Where the Circuit Court, to which an action of forcible entry and detainer has been taken by *certiorari* from a Justice, orders a bond to be given "in addition to the bond already given," such additional bond does not supersede the original one. *Scott, J., dis. Walter v. McSherry*, xxi. 76.

44. A voluntary dismissal of an appeal by the defendant in an action of forcible entry and detainer, is a breach of the condition of a recognizance to prosecute the appeal with effect and without delay, and the party aggrieved may have relief in an ordinary action on the recognizance. *Wilcox v. Daniels*, xxii. 493.

VI. DAMAGES.

45. A lease does not of itself vest possession in the lessee, but only gives a right thereto; and if the lessee takes and retains possession of the demised premises with force and strong hand, he is guilty of a forcible entry and detainer under the statute, (R. S. 1835, 277, § 2,) and under the act of February 6, 1837, (Acts 1836-7, 63,) is subject to the payment of double rent. *M'Girk, J., dis. Michau v. Walsh*, vi. 346.

46. As to damages in case of forcible entry and detainer. *Cathcart v. Walter*, xiv. 17. *Walter v. Cathcart*, xviii. 256.

47. In an action of forcible entry and detainer, the jury may assess damages for all waste and injury committed upon the premises, as well as for all rents and profits of the same up to the time of the rendition of the verdict. *Eads v. Wooldridge*, xxvii. 251.

VII. EVIDENCE OF TITLE.

48. In an action of forcible entry and detainer, under the statute, evidence of the "right of property" in the land in controversy is inadmissible. (R. S. 1835, 280, § 25.) *Stone v. Malot*, vii. 158.

49. The merits of the title can in no way be inquired into; it is immaterial whether the intruder is a trespasser or enters under claim of paramount title, a

purchaser at sheriff's sale under execution has his remedy by action of ejectment if the defendant refuse to yield possession. *Spalding v. Mayhall*, xxvii. 377.

VIII. VERDICT.

50. A verdict in these words, "we, the jury, find the defendants guilty in manner and form as charged in plaintiff's complaint; and that they took possession of the premises the 15th Nov., 1854; and that they have and recover of and from the defendants damages at the rate of \$2 16½ per month for the unlawful detention of said premises," though informal, is sufficient to authorize a judgment for restitution of the premises, and for an amount as damages, equal to double the gross amount of the rents and profits at the rate of \$2 16½ per month to the time of trial. *Gibson v. Lewis*, xxvii. 532.

FORFEITURE.

1. There is a distinction between a forfeiture imposed by a statute and one arising under contract. In one case it cannot be relieved against, in the other it may. *Woodson v. Skinner*, xxii. 13.

See CHANCERY, 42-46.

FRAUD.

- I. PROOF AND PRESUMPTION OF FRAUD.
- II. EFFECT OF FRAUD.
- III. RELIEF AGAINST FRAUD.—PLEADING AND DEFENSE.
- IV. POSSESSION.
- V. MISREPRESENTATIONS.
- VI. CONCEALMENT.
- VII. OMISSIONS.

I. PROOF AND PRESUMPTION OF FRAUD.

1. Transactions between third parties in reference to the subject matter of a suit, are not admissible in evidence on an issue of fraud, without testimony to connect such transactions with the parties to the suit, or one of them. *Bruffey v. Brickey*, v. 395.

2. Under a plea that a deed was obtained by fraud, covin and misrepresentation, the only admissible evidence of fraud is that relating to the execution of the instrument. Fraud in the consideration, Per SCOTT, J., or a partial or total failure of consideration, is no defense at law. *Burrows v. Alter*, vii. 424. *Burford v. Byrd*, viii. 240.

3. S. purchased certain shares of stock of the St. Louis Insurance Company, for and with the funds of B., but had it entered in his own name, but never pretended to set up any claim to it, but informed the company and others that it belonged to B. No fraud, in fact, upon the creditors of B. was pretended. An execution against S. was levied on this stock—*Held*, that it was not a case within the statute of frauds, (R. S. 1835, 283, §§ 1, 5,) that the stock was not liable for the debts of S., and that equity will interfere to restrain the sale by the sheriff, since the remedy of B. at law, if any, was incomplete. *Anderson v. Bidle*, x. 23.

4. The facts that a vendor was afflicted with a chronic disease, and the purchaser was his family physician, will not warrant an inference of fraud, especially where there are no attending circumstances to corroborate such an inference. *Doggett v. Lane*, xii. 215.

5. If the vendor uses means likely to impose on a person of ordinary prudence and circumspection, by throwing the purchaser off his guard on a point where he might reasonably place confidence in the representation made to him, and damage results to the purchaser, it is fraud. *Griffith v. Eby*, xii. 517.

6. A debtor who employs another to buy in his property, at a sheriff's sale, with no other view than to prevent a sacrifice of it, is not guilty of fraud. *Lee v. Lee*, xix. 420.

7. Pecuniary embarrassment, at the time of the sale of property, standing alone, is not sufficient evidence of an intent to defraud creditors. *Hickey v. Ryan*, xv. 62.

8. Where a suit is brought to foreclose a mortgage, the administrator of the mortgagor, being a party thereto, should defend it, but his omission to do so does not raise a presumption of fraud. *Cadwallader v. Cadwallader*, xxvi. 76.

9. Where a suit is commenced by attachment on a promissory note, and an interpleader claims the property attached as trustee for the wife of the defendant in the attachment, by virtue of a deed executed and recorded two years before the date of the note sued on, the plaintiff may show that the note sued on was given for a debt that existed before the execution of the deed. *Blue v. Penniston*, xxvii. 272.

10. And the acts of the grantor, (the father of the *cestui que trust*,) and her husband, in selling certain of the slaves embraced in the deed, are competent evidence as bearing upon the question of fraud in its execution. *Ibid*.

See ADMINISTRATION, 143 ; . . . CONSIDERATION, 6 ; . . . SALE, 7.

II. EFFECT OF FRAUD.

11. Where A. acquired possession of a slave from W. and gives an instrument of writing, purporting that he had hired the slave, it is a question for the jury,

in a controversy between W. and one claiming possession of the slave under A., whether the instrument was intended as a device to cover fraud, since, if it was, it would be void. *Irwin v. Wells*, i. 9.

12. Where an attorney directs an execution to issue, contrary to the instructions of his client, and the sheriff sells property under the execution, it is nevertheless necessary, in order to affect the purchaser at the sheriff's sale, to show him informed of the fraud. *Russell v. Geyer*, iv. 384.

13. The attorney for the plaintiffs in execution purchased the property at sheriff's sale, professing, at the time, to act as the agent of his clients, and with a view to the payment of their executions. He held the property for six or eight months, to give the defendant time to pay off the executions, and with a promise, in that event, to reconvey to him; but, the defendant failing to make a tender of the money, the attorney sold the property at public auction, to satisfy his client's demands—*Held*, that there being no evidence of fraud, either at the sheriff's sale or the sale at auction, the attorney is not to be considered as a trustee for the defendant's creditors, and that the purchaser took a good, legal and equitable title. *Ibid*.

III. RELIEF AGAINST FRAUD.—PLEADING AND DEFENSE.

14. A general allegation of fraud, in a plea to an action on a bond, is sufficient without specifying the particulars of the fraud. *Montgomery v. Tipton*, i. 446. *Pemberton v. Staples*, vi. 59. *Hughes v. Overton*, vi. 60.

15. E. and W., with others, started on a trading expedition to Santa Fe. After they had passed beyond the reach of civil process, E. sold his goods to W. on credit, being induced to do so through the fraudulent representations of W. as to his property and means. E. soon ascertained the fraud, and demanded back the goods, which W. refused to surrender, unless E. would give him his bond for one hundred dollars. E. gave the bond, and took back his goods—*Held*, that the bond was obtained by oppression, through fraud, and that, as a defense to it at law was doubtful, chancery would take jurisdiction, and perpetually enjoin a judgment at law obtained thereon. *West v. Wayne*, iii. 16.

16. The principal having deposited with the agent \$850 to buy negroes, and the agent having purchased them for a less amount, and transferred them to the principal for the sum deposited, it was held to be a fraud upon the principal, and that he could recover the difference between the deposit and the price actually paid. *Kanada v. North*, xiv. 615.

17. An administrator cannot impeach a gift or conveyance of his intestate for fraud as to creditors, although the estate may be insolvent. *Brown v. Finley*, xviii. 375. *George v. Williamson*, xxvi. 190.

18. It is a good defense to an action on a promissory note that it was given to the plaintiff in furtherance of an attempt on his part to defraud his creditors. *Hamilton v. Scull*, xxv. 165.

19. The plaintiff bought a leasehold estate, encumbered with a deed of trust given to secure the payment of certain debts. He was aware of the incumbrance

at the time of this purchase, and supposed that the debts were genuine and really due, but, after having paid the amount of the incumbrance, discovered that the debts were fraudulent and pretended—*Held*, that he could not recover from the *cestui que trust* the amount of the incumbrance thus paid to him. The plaintiff's grantor is the only one who can take advantage of the fraud. *Magwire v. Hall*, xxvii. 146.

See BOND, 23, 24; . . . MORTGAGE, 30; . . . PLEADING, 47, 48.

IV. POSSESSION.

20. Though one deliver personal property to another, and suffer him to retain possession of and exercise control over it, as though it were his own, yet, however strong may be the tendency of the circumstances attending the transaction to show fraud, they do not render it fraudulent in law; but whether fraudulent or not, is purely a question for the jury to determine. *McDermott v. Barnum*, xvi. 114.

V. MISREPRESENTATIONS.

21. Where the vendor makes false representations of facts as to the quality of land or the title thereto, by which a party, relying upon them, is induced to purchase, such representations, however innocently made, are fraudulent as to the purchaser. But a mistaken opinion as to title, where the means of information are equally accessible to both parties, is not so. *Glasscock v. Minor*, xi. 655.

22. In order to make a representation a ground for action of deceit or fraud, it must have been known to be false, and have been made with intent to deceive or defraud. *Jolliffe v. Collins*, xxi. 338.

VI. CONCEALMENT.

23. It is not fraudulent to sell unsound property, knowing it to be so, where there is no concealment. *Stewart v. Dugin*, iv. 245.

24. Fraud, in fact, is a question for the jury. Secrecy, concealment, and facts indicating a design to give one falsely the appearance of owning property, are badges of fraud for the jury to weigh. *Ross v. Crutsinger*, vii. 245.

VII. OMISSIONS.

25. The fact that an executor, in applying to the County Court for an order directing the reservation of the personal estate, and a sale of real estate for the payment of debts, omits to bring to the notice of the court the will of the testator of record in such court, in which he directs that all his debts shall be paid

out of his personal effects, will not of itself affect the executor with a fraudulent intent in procuring the order. *Overton v. Webster*, xxvi. 332.

See ACTION, 10, 11 ; . . . ASSIGNMENT, V ; . . . ATTACHMENT, I ; . . . CHANCERY, 47-53 ; . . . CONTRACT, 65 ; . . . EXECUTION, 92 ; . . . SALE, VI.

FRAUDS AND PERJURIES.

- I. SALE OF LANDS.
- II. SALE OF GOODS AND CHATTELS.
- III. CONTRACT NOT TO BE PERFORMED WITHIN ONE YEAR.
- IV. PROMISE TO ANSWER FOR DEBT OF ANOTHER.
- V. MEMORANDUM.
- VI. POSSESSION.
- VII. PART PERFORMANCE.
- VIII. PLEADING.

I. SALE OF LANDS.

1. An improvement on land of the United States may be sold without a memorandum in writing, and is not affected by the statute of frauds. *Clark v. Shultz*, iv. 235.

2. An indorsement on the back of a land receiver's receipt of the words "transferred to V.," and signed by the party holding such receipt, is a sufficient memorandum in writing of a contract of sale of the land described in such receipt, to take the case out of the statute of frauds. It is not necessary that the consideration should be stated in the memorandum. The payment of the purchase money, and the delivery of the receipt so indorsed, constitute a valid and binding agreement. *WASH, J., dis. Bean v. Valle*, ii. 126. *Halsa v. Halsa*, viii. 303.

3. The provisions of § 3 of the statute, (R. S. 1835, 283,) do not affect the rights of creditors secured by § 2 of the same act. Therefore the purchaser at a sale, under an execution in his own favor, does not lose any of the rights of a creditor under said act. *King v. Bailey*, vi. 575.

4. Where a party takes the conveyance of land, with notice of the legal or equitable title of another to the same land, he will be held a trustee for the benefit of the other, and cannot avail himself of the statute of frauds, on the ground that the agreement under which he took the conveyance was not in writing. *Truesdell v. Cullaway*, vi. 605.

5. The defendant sold a lot of ground to A., and gave his bond for a conveyance of it upon being paid the purchase money. Subsequently a judgment was rendered against A. on a note, upon which the defendant was his security. An

execution was issued and levied upon the lot in question by request of the defendant, he promising to make the title good to the purchaser—*Held*, that this promise, not being in writing, was within the statute of frauds, and therefore void. *Bryan v. Jamison*, vii. 106.

6. An agreement in writing to sell "all that piece of property known as the Union Hotel property," does not take the case out of the statute of frauds, since the estate could not be identified without resort to parol testimony. *King v. Wood*, vii. 389.

7. A person making a parol contract to convey lands, may or may not insist upon the protection of the statute of frauds. *McGowen v. West*, vii. 569. *Farrar v. Patton*, xx. 81.

8. Where a creditor purchases real estate at sheriff's sale, on an execution, with an understanding between himself and a mortgagee of the same property, that he will, on being paid the amount of his execution by the mortgagee, convey to him the property, a court of chancery will compel a conveyance in compliance with such understanding. Such agreement to convey is not within the statute of frauds. *Rose v. Bates*, xii. 36.

9. Although a title bond be executed by an agent in such manner as to prevent its operating at law as the agreement of the principal, yet, in equity, it will be a sufficient note or memorandum to defeat a bar to its specific performance, founded on the statute of frauds, it appearing that the agent was authorized and intended to bind his principal. *Johnson v. McGruder*, xv. 365.

10. A verbal authority to an agent to make a contract relative to the sale of lands is valid, and not within the statute of frauds. *Ibid*.

11. A. purchased certain real estate in his own name and with his own money, and at the time of the purchase agreed with B., that if he (B.) would, before a certain time, pay one-half of the purchase money, he should take a half interest in the land—*Held*, that B., not having paid any portion of the purchase money, had no interest, legal or equitable, in the land, and that the contract between A. and B. was within the statute of frauds. *Clawater v. Tetherow*, xxvii. 241.

12. A sheriff's sale of real estate is within the statute of frauds, and a note or memorandum thereof in writing must be made in order to bind the parties. *Evans v. Ashley*, viii. 177. *Alexander v. Merry*, ix. 510. *Wiley v. Robert*, xxvii. 388.

13. The sheriff's certificate of sale, under the stay law of June 28, 1821, (1 Ter. L. 778,) is a sufficient note or memorandum to take a case out of the statute of frauds. *Evans v. Ashley*, viii. 177.

14. A memorandum, made by a deputy sheriff, and signed by him, of a sale of one of several lots in partition, in which Louis Robert and others were plaintiffs, and B. T. Adams defendant, in these words: "Partition lands—Louis Robert v. B. T. Adams—Lot No. 11—274, 80-100 a.—Louis Robert, \$10,50 per a.—\$2,885 40," is sufficient to take the case out of the statute of frauds. *Ibid*.

15. And the sheriff can, in such a case, maintain an action in his own name against the purchaser for the purchase money, although he may not have given a note therefor to the sheriff. *Ibid*.

See ESTOPPEL, 3.

II. SALE OF GOODS AND CHATTELS.

16. The fact that wheat, contracted to be sold and delivered in Illinois, is to be paid for on its arrival at St. Louis, will not subject the contract to the operation of § 6 of the statute of frauds. (R. S. 1845, 531.) *Houghtaling v. Ball*, xix. 84.

17. The defendant contracted to purchase of the plaintiff a hundred head of cattle, and deposited \$500, in part payment thereof, in the hands of a broker, who, giving a receipt therefor, stated that the money was received on account of W. A., the plaintiff's name being J. F. A. Upon the deposit being made, the plaintiff tendered the cattle to the defendant, who refused to receive them, on the ground that he had contracted with W. A., and not with J. F. A.—*Held*, that it might be shown by parol evidence, for the purpose of taking the case out of the statute of frauds, (§ 6,) that the money was in reality deposited for the plaintiff. *Alexander v. Moore*, xix. 143.

18. A contract for the sale and delivery of goods, if so completed as to be valid in the State where made, will be enforced in this State. *Houghtaling v. Ball*, xx. 563.

19. A contract was made for the sale of cattle in the field of the seller. The purchaser told the seller to keep the cattle and feed them until he sent for them, at the expense of the purchaser. The seller agreed to do so, but told the purchaser, that if any of them died he must bear the loss, to which the latter assented—*Held*, that there was not a delivery sufficient to take the case out of the statute of frauds. *Kirby v. Johnson*, xxii. 354. [See *Shindler v. Houston*, 1 *Comst. Rep.* 261.]

20. Until a sale of personal property is rendered complete by delivery and acceptance, it will remain at the risk of the seller. *Lovelace v. Stewart*, xxiii. 384.

See PRACTICE, 127 ; . . . SALE, II.

III. CONTRACT NOT TO BE PERFORMED WITHIN ONE YEAR.

21. B., by verbal contract, hired the services of a negro to K. for one year. The negro was delivered at the time agreed on, and the year's service duly rendered—*Held*, that the contract was not within that provision of the statute requiring agreements, not to be performed within one year from the making of them, to be in writing. (R. S. 1825, 214, § 1.) *Blanton v. Knox*, iii. 342.

22. But an agreement by which the plaintiff undertakes personally to serve the defendant, for a period of five years, is within the statute, and must be reduced to writing. *Pitcher v. Wilson*, v. 46.

23. Only those contracts are embraced within the statute, (R. S. 1845, 530, § 5,) which, by express stipulation, are not to be performed within that time. *Foster v. McO'Brien*, xviii. 88.

24. And agreements that may be performed within a year from the making thereof, are not within the statute of frauds. *Suggett v. Cason*, xxvi. 221.

25. A. borrowed of B. \$120 to enable him to enter a tract of land, and was to

have the money for a year, by giving a mortgage upon the land; the land was entered, but the mortgage was not given—*Held*, that the agreement to give the mortgage was within the statute of frauds, and that the agreement to wait a year was consequently without a consideration, and that B. might sue immediately. *Binion v. Browning*, xxvi. 270.

See PLEADING, 143.

IV. PROMISE TO ANSWER FOR DEBT OF ANOTHER.

26. A parol promise to see the debt of another paid, in case the creditor would give the debtor time, is collateral and within the statute of frauds. *Musick v. Musick*, vii. 495.

27. Money belonging to the school fund was loaned to one of the defendants, but both verbally acknowledged their liability for it—*Held*, that the acknowledgment of the other defendant was within the statute of frauds, and that, as it was not in writing, he was not liable. *Bailey v. Trustees*, xiv. 498.

28. If A. negotiates for B. a loan from C., C. taking B.'s note as security, A. incurs no liability to C. by reason of said loan; neither will an assignment by B. of his stock in trade to A., in fraud of creditors, authorize a judgment against A. for the original debt, though the goods may be pursued in A.'s hands on a judgment against B. *Aspinall v. Jones*, xvii. 209.

29. A promise by one to share in the expenses, for which others have become liable, if made to those persons, is not a promise to pay the debt of another within the statute of frauds. *Flemm v. Whitmore*, xxiii. 430.

30. An oral agreement that real estate, the title to which had been previously taken as a security, should stand as a security for further advances, is within the statute of frauds, (R. S. 1845, 530, § 5,) and consequently void. *Curle v. Eddy*, xxiv. 117.

V. MEMORANDUM.

31. A promise to indemnify an officer for selling property on execution, which property is claimed by the debtor to be exempt by law, is good and binding, even though not in writing, or evidenced by any written instrument. *Scott, J., dis. McCartney v. Shepard*, xxi. 573.

32. In order that an entry of a sale made by an auctioneer may satisfy the requirements of the statute, it must be made at the time of the sale; an entry made a month after is not sufficient. *White v. Watkins*, xxiii. 423.

33. A written advertisement or notice of a trustee's sale, signed by him, is not a sufficient memorandum within the statute of frauds. *White v. Watkins*, xxiii. 423.

34. Where an agreement, not in writing, has been wholly performed on the one side, the other party cannot interpose the defense of the statute of frauds. *Suggett v. Cason*, xxvi. 221.

VI. POSSESSION.

35. The statute (R. S. 1835, 282,) does not require that conveyances of goods and chattels, made for a valuable consideration, should be recorded. The act avoids conveyances of goods and chattels for a consideration not deemed valuable in law, unless possession, actually and *bona fide*, accompany the conveyance or gift, or unless the same is acknowledged and recorded in like manner as deeds of land. *King v. Bailey*, viii. 332.

36. The statute of frauds, rendering void loans of personal property after five years' possession, as to all creditors and purchasers of the persons remaining in possession, does not affect the title as between the parties to the loan. And where the loanee dies in possession, the property is not assets, and cannot be recovered as such by the executor or administrator of the loanee. (See R. S. 1835, 283, § 5.) *Smoot v. Wathen*, viii. 522.

VII. PART PERFORMANCE.

37. Payment of the purchase money is not such part performance as to take a case out of the statute; nor is the mere taking of possession of the land sold without the consent of the grantor, such part performance. *Per M'GIRK, J. Bean v. Valle*, ii. 126.

38. A. agreed, verbally, to convey a certain tract of land to B, in consideration that B. would execute to one C. a deed confirming to him the sale of a certain other parcel of land—*Held*, that the execution of the deed by B. to C. was not such part performance as would take the case out of the statute of frauds. *Chambers v. Lecompte*, ix. 566.

39. Classification of cases in which part performance operates to withdraw a verbal contract from the statute of frauds. *Per NAPTON, J. Ibid.*

40. Frauds and trusts are not within the statute of frauds. *Groves v. Fulsome*, xvi. 543.

41. In order that a delivery of possession of land to a vendee, may amount to such a part performance as to take the case out of the statute, the situation of the parties must be such that a refusal to carry out the parol contract will work a fraud upon the purchaser. *White v. Watkins*, xxiii. 423.

42. The possession that will be deemed such a part performance of a parol contract for the sale of land, as will take the case out of the statute of frauds, is an actual possession taken by the vendee under the contract, with the consent of the vendor, and with a view to the performance of the contract, and not the constructive possession which the law imputes to the owner where there is no actual adverse possession in a stranger. *Charpiot v. Sigerson*, xxv. 63.

43. In order to take a case out of the statute of frauds on the ground of a part performance of a parol contract for the sale of land, the acts relied on should be definite, and referable exclusively to the contract, and the contract itself should be fully established in all its essential terms. *Ibid.*

See CHANCERY, 32.

VIII. PLEADING.

44. Where a party seeks in equity a specific performance of a contract, which is shown upon the face of the bill not to have been in writing, the defendant may avail himself of the statute of frauds by demurrer. *Chambers v. Lecompte*, ix. 566.

45. The defendant may rely upon the statute of frauds as a defense to a petition for the specific performance of a parol contract to convey land, although he does not set it up in his answer, but simply denies the contract. *Hook v. Turner*, xxii. 333. See PLEADING, 55.

See LANDLORD AND TENANT, 5.

FRAUDULENT CONVEYANCES.

I. GIFTS AND VOLUNTARY CONVEYANCES.

II. IN FRAUD OF CREDITORS.

III. BY INSOLVENTS.

IV. EVIDENCE AND PRESUMPTIONS.

V. EFFECT AS TO SUBSEQUENT PURCHASERS.

VI. POSSESSION.

VII. CONSIDERATION.

VIII. DAMAGES.

IX. PLEADING.

X. AVOIDANCE.

XI. SPECIAL CASES.

I. GIFTS AND VOLUNTARY CONVEYANCES.

1. A. agreed to make title of a lot to B., and afterwards, and before the title was made, A. and B. became indebted to C., and after such indebtedness accrued, B. caused A. to make the title of the lot to his, B.'s, daughter, who paid no consideration therefor. C. obtained judgment against B., and having issued execution, and finding no property on which to levy, filed a bill in chancery against B.'s daughter, for a discovery and a decree of the title to B., so that execution might be levied on it; and the bill was demurred to—*Held*, that the passing of the title to the daughter was fraudulent, and that the bill contained equity enough to require the defendant to answer. *Peay v. Sublet*, i. 449.

2. A voluntary conveyance is not *per se* fraudulent as against creditors prior or subsequent. The *bona fides* of every such conveyance is a question of fact for the jury, under all the circumstances attending its execution. *Lane v. Kingsberry*, xi. 402. *Pepper v. Carter*, xi. 540.

3. Gifts from husband to wife, whether voluntary or founded on a good consideration, will be sustained *inter partes* in equity; and where a deed is not

recorded as required by the statute, it will still be valid between the parties if founded on a good consideration. *Woodson v. McClelland*, iv. 495.

4. A., by deed purporting to be founded on a valuable consideration, conveyed four slaves to B., with a condition that the possession of them should remain in A. for life. After twenty years' possession, A. emancipated them by deed duly executed, &c.—*Held*, that however void the deed to B. might have been, as against creditors or subsequent purchasers, it is at least good against those claiming under the deed of emancipation; the latter being a voluntary act, and the grantees not being purchasers for a valuable consideration. *Amy v. Ramsey*, iv. 505. *Rhody v. Ramsey*, iv. 512.

5. And it is not necessary to prove any consideration for the bill of sale, as against the claimants under the grantor. *Ibid*.

6. Where a husband makes a voluntary conveyance for the benefit of his wife, a precedent conveyance made by him for her benefit is competent evidence on the question of the good faith of the latter. *Lane v. Kingsberry*, xi. 402.

7. A., while residing in Tennessee, conveyed certain slaves to B., in payment of a debt to him, being the only debt he owed. On the same day, by a voluntary conveyance, duly executed according to the laws of Tennessee, B. conveyed the slaves to C. in trust for the wife of A. and her children. A. then moved to this State with his family, bringing with him the slaves, and continuing to exercise acts of ownership over them, his wife passively submitting to his assumed authority. After some years' residence here, A. becomes involved in debt, and his creditors levied on and sold the slaves as his property, the wife, at the time of the levy and sale, proclaiming her title—*Held*, that so far as A.'s creditors were concerned, it was immaterial whether B., at the time of his conveyance to C. was insolvent, or designed to practice a fraud; that by the deed the title was vested in C. for the benefit of A.'s wife and children, and the passive submission of the wife, and the assumed ownership of A., do not affect her title; and that the title being vested in C. by the deed properly executed, the removal to this State, and failure to record the deed here, does not affect the rights of the wife. *Murray v. Fox*, xi. 555. See *Bank v. Lee*, 13 Pet. R. 107. *Crenshaw v. Anthony*, Mart. and Yerg. R. 110.

8. *Bona fide* gifts and conveyances to minor children living with their parents, are not affected with fraud merely from want of possession; but where a father, in failing circumstances, purchases property with his own money and has it conveyed to his minor children, such conveyance is void as to subsequent purchasers from him and as to his subsequent creditors. *Howe v. Waysman*, xii. 169.

9. The first and fourth sections of the act relating to fraudulent conveyances (R. S. 1845, 525,) must be construed like any other statute declaring a transaction void. Where the acts appear, which the law declares shall make a conveyance void, it is the duty of the court to declare the law to the jury. *Robinson v. Robards*, xv. 459.

10. A conveyance, in consideration of a previous assignment of the right of dower, would be voluntary as to existing creditors. *Woodson v. Pool*, xix. 340.

11. A gift of a chattel by husband to wife, without consideration, is ineffectual. *Ibid*.

12. The gift of a slave, evidenced by a writing not under seal, passes no title to the donee where the possession of such slave remains in the donor. (R. S. 1835, 588, Art. III.) *Jones v. Covington*, xxii. 163.

13. A parol gift of a slave to one for life, remainder to her children then living, followed by the possession of the donee for life, is valid. *Pemberton v. Pemberton*, xxii. 338.

14. The fact that a father, upon the marriage of his daughter, delivered to her and his son-in-law a slave, which remained in possession of the latter for six years, justifies the conclusion that the slave was a gift. *Jones v. Briscoe*, xxiv. 498.

15. Where a father sends home with his married daughter a slave, saying at the time that he had given the slave to her, the gift will not be presumed, as a matter of law, to be absolute. *Beale v. Dale*, xxv. 301.

II. IN FRAUD OF CREDITORS.

16. The fourth section of the statute relating to fraud (R. S. 1835, 283,) embraces only creditors of or purchasers from the parties to the conveyance. A purchaser from a person not a party to the conveyance, but having only the possession of the property in right of another, and not deriving title under the conveyance, is not embraced within this section. *Allison v. Bowles*, viii. 346.

17. On the trial of a plea in abatement in an attachment suit, wherein the affidavit charged that the defendant had fraudulently conveyed his property, a conveyance of property made by him to pay a debt justly due, will not be held fraudulent because the defendant, about the time of such conveyance, made false representations as to his condition and intentions. *Chouteau v. Sherman*, xi. 385.

18. A conveyance made by a debtor to his creditor, though with the intent to hinder and delay his other creditors, cannot be avoided by them unless the vendee knew of such fraudulent purpose. *Little v. Eddy*, xiv. 160.

19. A deed, although made for a valuable and adequate consideration, may be void as to creditors, because of the intent with which it was made. *Cason v. Murray*, xv. 378.

20. A debtor in failing circumstances may give a preference to one or more of his creditors to the exclusion of others; and such disposition of his effects is not impeachable on the ground of fraud, though it embraces all his property. *Ibid.*

21. The intent which avoids a deed as to creditors, is an intent to "hinder, delay, or defraud" them, and that intent is to be ascertained from all the circumstances under which the deed was made. An intent to prevent a sacrifice of the debtor's property is not sufficient. *Ibid.*

22. Under the statute relating to fraudulent conveyances, (R. S. 1845, 527, § 8,) the purchaser of personal property from a mortgagor in possession will hold against a prior unrecorded mortgage, even though he had notice of it. It seems, however, that such would not be the case were the mortgage recorded within a reasonable time after its execution. *Bryson v. Penix*, xviii. 18.

23. If A., in fraud of creditors, transfers property to B., who, in payment of a just debt due to C., transfers it to C., who has no knowledge of the fraud between

A. and B., C. will hold it against the creditors of A.; otherwise if C. was cognizant of the fraud. *Knox v. Hunt*, xviii. 174.

24. In order to bring an assignment within the statute of fraudulent conveyances, on the ground of an intent to hinder and delay creditors, there must be such an intent actually entertained; it is not sufficient that such is the effect of the assignment. *Gates v. Labeaume*, xix. 17.

25. Where the plaintiff in an execution, acting in concert with the defendant, purchases in the property of the defendant with a view to cover it up from the creditors of the latter, the transaction is fraudulent, and the other creditors may treat the execution sale and the sheriff's deed as nullities. *Dallam v. Renshaw*, xxvi. 533.

26. And where all the facts bearing upon the question of the intent of such a transaction will as well consist with honesty as dishonesty and fraud therein, the court ought not to find the same to be corrupt and fraudulent; the proof of fraud should be perfectly satisfactory. *Ibid*.

See JURISDICTION, 30.

III. BY INSOLVENTS.

27. Where a conveyance is made by a person with an intent to take the benefit of the insolvent act, such conveyance is so far fraudulent as to deprive the party of the benefit of the act. *Talbot v. Jones*, v. 217.

28. A voluntary conveyance without consideration, or merely for love and affection, made by one who is insolvent, is void as against creditors, although the grantee were ignorant of the insolvency and innocent of the fraud. *Per Scott, J. Gamble v. Johnson*, ix. 597.

29. A voluntary conveyance of a lot worth only about \$40, made by a parent who was at the time in the possession of much valuable property, although then embarrassed by debts, will not, as to subsequent creditors, be deemed fraudulent without proof of actual fraud. *Pepper v. Carter*, xi. 540.

IV. EVIDENCE AND PRESUMPTIONS.

30. To impeach a voluntary conveyance as fraudulent, it must be shown that the grantor was largely indebted at the time the conveyance was made. *Baker v. Welch*, iv. 484.

31. To determine the validity of a voluntary conveyance as against creditors, every circumstance tending to show the pecuniary condition of the grantor at the time of such conveyance is admissible. *Lane v. Kingsberry*, xi. 402.

32. Under § 2 of the statute relating to fraudulent conveyances, (R. S. 1845, 525,) indebtedness at the time of a voluntary conveyance, is evidence of fraud, although there is some diversity of opinion as to the extent of indebtedness necessary to constitute the conveyance fraudulent. *Woodson v. Pool*, xix. 340.

33. A. purchased land and caused it to be conveyed to his son, with intent to defraud his creditors—*Held*, in a suit to annul this deed in behalf of one of the

creditors who had purchased the land at a sale on execution under a judgment in his favor against A., that evidence was inadmissible to show the pecuniary circumstances of A. several years after the conveyance to his son. *Rankin v. Harper*, xxiii. 579.

34. Where it appears upon the face of a deed that it is a conveyance in trust to the use of the grantor, the courts will, as a matter of law, declare it void, as against creditors. *Zeigler v. Maddox*, xxvi. 575.

35. But where the deed is fair upon its face, the existence of a fraudulent intent is a question of fact to be tried by a jury. [*Milburn v. Waugh*, xi. 369, and *Brooks v. Wimer*, xx. 503, commented upon and explained.] *Ibid*.

See EVIDENCE, 45.

V. EFFECT AS TO SUBSEQUENT PURCHASERS.

36. A *bona fide* purchaser, for a valuable consideration, from a fraudulent grantee, is not affected by the fraud in the prior conveyance. *Wineland v. Coonce*, v. 296.

37. A *bona fide* purchaser for a valuable consideration, is protected under the statutes of 13th and 27th Elizabeth, as adopted in this State, whether he purchases from a fraudulent grantor or a fraudulent grantee. *Howe v. Waysman*, xii. 169.

VI. POSSESSION.

38. The purchaser of a slave from a borrower who has had five years' possession, without any demand being made or writing executed in relation thereto, will hold the same against the bailor, although at the time of the purchase he had full knowledge of the circumstances of the title. (See R. S. 1835, 283, § 5.) *Cook v. Clippard*, xii. 379.

39. The continued possession of personal property by the vendor, after a sale of it, is, under the statute, (R. S. 1845, 528, § 10,) presumptive evidence of fraud, and becomes conclusive unless the vendee shows that the sale was made in good faith, and without any fraudulent intent. *Kuykendall v. M'Donald*, xv. 416.

40. The question of fraud in such a case, is one of fact to be determined by the jury, and in the determination of it, they should not be satisfied with the mere absence of direct evidence of a fraudulent intent, in connection with proof of a valuable consideration. They should be satisfied that there was some good and sufficient reason for leaving the property in the possession of the vendor. *Ibid*. *Middleton v. Hoff*, xv. 415.

41. The law does not require absolute bills of sale of personal property to be recorded, and the placing them upon record, being an unauthorized act, avails the party nothing. *Kuykendall v. McDonald*, xv. 416.

42. Where it appears that there is a conveyance of property, for a consideration not deemed valuable in law, and possession does not really and *bona fide*

accompany such conveyance, and it is not properly recorded, it is the duty of the court to declare to the jury that such conveyance is void against creditors and purchasers. *Robinson v. Robards*, xv. 459.

43. If a conveyance, on the face of it, appears to be for the use of the person making it, as a matter of law, the court will declare it void against creditors. *Ibid*.

44. Under the statute, (R. S. 1845, 527, § 5,) the delivery of a slave, on a bailment by way of loan, does not subject the property to the debts of the bailee, until possession under the loan shall have continued five years. *McDermott v. Barnum*, xvi. 114.

45. Where a party has been for five years in possession of goods loaned to him, his administrator cannot, for the benefit of the intestate's creditors, impeach the lender's title. *Criddle v. Criddle*, xxi. 522.

46. A. executed a deed of gift of a slave to B., with a reservation to the donor, during her lifetime, of "the use and benefit of the labor" of the slave, the donee to take possession at the death of the donor—*Held*, that this deed, being unrecorded and unaccompanied with possession in the donee, was void, under the statute, (R. S. 1845, 526, § 4,) as against a subsequent purchaser from A., though with notice. *Scott, J., dis. Layson v. Rogers*, xxiv. 192.

VII. CONSIDERATION.

47. In all cases of conveyances affecting creditors and purchasers, inadequacy of price is a circumstance of great weight against their validity. *Robinson v. Robards*, xv. 459.

48. A conveyance may be for a valuable consideration and yet fraudulent and void as to creditors. *Johnson v. Sullivan*, xxiii. 474.

VIII. DAMAGES.

49. A person injured or defrauded by a fraudulent conveyance may maintain an action for double damages against the parties privy thereto, before conviction of the criminal charge. (See R. S. 1825, 290, § 39.) *Miller v. Conway*, ii. 213.

IX. PLEADING.

50. A bill to set aside a voluntary conveyance of real estate, on the ground that the grantor was greatly indebted at the time of the conveyance, must show that the grantor did not have property enough to pay his debts, without resorting to the real estate parted with in the voluntary conveyance; and if this does not appear, a decree setting aside the conveyance will be reversed. *Bird v. Bolduc*, i. 701.

X. AVOIDANCE.

51. Parties and privies cannot allege their own fraud as a ground for varying or avoiding a deed. *Henderson v. Henderson*, xiii. 151.

52. A conveyance of an intestate cannot be impeached by his administrator or heirs, for fraud as to creditors. None but creditors themselves, and those in privity with them, can avoid it. *McLaughlin v. McLaughlin*, xvi. 242.

53. None but a creditor or purchaser can raise the objection that a deed conveying articles consumable in the using, the grantor retaining possession, is void and inoperative. *Ibid.*

54. Where a conveyance is made in fraud of creditors, they or any one of them may, in an equitable proceeding, have the same set aside, and the creditor who first files his petition obtains thereby a priority, and is entitled to be first paid from the proceeds of the sale. *George v. Williamson*, xxvi. 190.

XI. SPECIAL CASES.

55. A. had mortgaged certain goods to B., but the mortgage did not conform to the act relating to fraudulent conveyances, (R. S. 1845, 527, § 8.) A party who was alleged to have purchased the goods from B. was summoned as garnishee for their price by a creditor of A.—*Held*, that the questions for the jury were, whether the transaction between A. and B. was fraudulent as to A.'s creditors, and, if not, whether the subsequent purchaser bought the goods from A. or B. *Bennett v. Wolcott*, xix. 654.

56. A. made a fraudulent conveyance of land. A judgment was subsequently recovered against him, and the land sold under an execution, and B. became the purchaser, who afterwards conveyed back to A., who then conveyed to C., who had notice of the facts—*Held*, that as A. could not have obtained equitable relief against his fraudulent deed, neither could his grantee with notice. *Perry v. Calvert*, xxii. 361.

See CRIMINAL LAW, 63.

FREEDOM.

I. EFFECT OF RESIDENCE OF SLAVE IN OTHER STATE OR TERRITORY.

II. REMEDY FOR THE RECOVERY OF FREEDOM.

- a. PERMISSION TO SUE.
- b. INFANTS.
- c. PLEADING.
- d. EVIDENCE.
- e. JUDGMENT.

III. DAMAGES FOR DETENTION IN SERVITUDE.

IV. SAFETY OF PLAINTIFF PENDING SUIT.

I. EFFECT OF RESIDENCE OF SLAVE IN OTHER STATE OR TERRITORY.

1. Where a slave was mortgaged in Kentucky, and before condition broken, the mortgagor carried her into Illinois and there settled with a view to a permanent residence, it was *held* that the slave, under the ordinance of 1787, acquired her freedom, subject to the right of the mortgagee to reduce her to slavery by such means as were rendered necessary by the terms of the mortgage, and by some process known to the law. *Milly v. Smith*, ii. 171.

2. A slave who resided as a laborer at the Ohio Saline, in Illinois, in 1817, with the consent of his master, is, under the ordinance of 1787, entitled to his freedom. But, under the constitution of Illinois, a slave might be hired to work there from year to year, if such yearly hiring were in good faith, without his acquiring such right. *Vincent v. Duncan*, ii. 214.

3. A resident citizen of Illinois may own and employ slaves in this State, and an occasional visit of a slave to that State does not constitute such a residence there as to entitle him to his freedom. *LaGrange v. Chouteau*, ii. 19.

4. Contracts entered into with negroes and mulattoes, under the act of 1807 of the Illinois territorial legislature, relating to the introduction of negroes and mulattoes, are not rendered obligatory under Art. VI, § 3, of the constitution of the State of Illinois. *Hay v. Dunky*, iii. 588.

5. The ordinance of 1787 for the government of the North-Western territory, had no force in any part or precinct of that territory in the possession of Great Britain, prior to June 1, 1796. A slave held within any such port prior to that time, acquired no right to his freedom by virtue of such ordinance. *Chouteau v. Pierre*, ix. 3.

6. The voluntary removal of a slave, by his master, to a State or territory where slavery is prohibited, with a view to a residence there, does not entitle the slave to sue for his freedom in the courts of this State. GAMBLE, J., *dis.* [OVER-
RULES *Winny v. Whitesides*, i. 472. *LaGrange v. Chouteau*, ii. 19. *Milly v. Smith*, ii. 36. *Ralph v. Duncan*, iii. 194. *Julia v. McKinney*, iii. 270. *Nat v. Ruddie*, iii. 400. *Rachael v. Walker*, iv. 350. *Wilson v. Melvin*, iv. 592.]
Scott v. Emerson, xv. 576. *Sylvia v. Kirby*, xvii. 434.

II. REMEDY FOR THE RECOVERY OF FREEDOM.

2. PERMISSION TO SUE.

7. Upon a petition to the Circuit Court of a person held in slavery, praying to be permitted to sue as a poor person, under a statute which provided that "if, in the opinion of the court, the petition contains sufficient matter to authorize their interference, the court shall award the necessary process to bring the cause before them," (Gey. Dig., 210, § 1,) the claimant of the slave cannot, on this application, be permitted to come in and disprove the matter contained in the petition, and thereby prevent the institution of a suit. *Cutiche v. St. Louis Circuit Court*, i. 608.

8. The court is not bound, however, to permit every petitioner to sue. Being presumed to know its own records, it would not permit persons to sue for freedom whose right to freedom had been formerly adjudicated by it. The court, upon such an application, would not, however, have a right to resort to the records of another court for evidence in such a case. *Ibid.*

9. The action of trespass, &c., for the recovery of freedom, may be sustained without the plaintiff filing his petition and obtaining leave to sue; the provisions in the statute are intended for the benefit of the plaintiff and may be waived by him. (See R. S. 1825, 404, § 1.) *Tramell v. Adam*, ii. 155.

b. INFANTS.

10. The statute relating to suits for freedom, (R. S. 1825, 404,) does not affect the common law rights of infants. They must sue by guardian or next friend, and cannot appear by attorney; but, where the contrary does not appear, a party will be presumed to be of age, and a judgment against him held good till reversed. *Jeffrie v. Robideaux*, iii. 33.

c. PLEADING.

11. In an action of assault and battery and false imprisonment, under the act of June 27, 1807, (1 Ter. L. 96,) the defendant pleaded that the plaintiff was his slave, and traversed her being free, as alleged in the declaration, to which plaintiff replied that she was free—*Held*, on demurrer, that the replication was good. *Susan v. Hight*, i. 118.

12. An averment by the plaintiff "that he was and is a free man, and that he is held as a slave," is sufficient under the statute, and, if proved, sustains the action. (See R. S. 1825, 405, § 3.) *Tramell v. Adam*, ii. 155.

d. EVIDENCE.

13. It is not necessary to show any positive enactment establishing slavery, and the fact of its existence being established, it devolves upon the plaintiff to show the law forbidding it. *Chouteau v. Pierre*, ix. 3. *Charlotte v. Chouteau*, xi. 193.

14. The fact that the conveyance of a negro was made in the presence of the Spanish Lieutenant Governor and authenticated by his signature, is no adjudication that such person was a slave. *Charlotte v. Chouteau*, xxi. 590.

15. Where a negress, brought from Canada, was sold in this State in 1795, her children might show that their mother was never properly held as a slave in Canada, or that, having once been a slave, she had gained her freedom. Either of these being shown, the children were entitled to be free. *Ibid.*

16. In a suit for freedom, the onus of proving his right must rest upon the plaintiff; but the law does not couple the right to sue with ungenerous conditions; he may prove such facts as are pertinent to the issue, and may invoke such presumption as the law raises from particular facts. *Same case*, xxv. 465.

17. There are exceptions to the rule that where the law points out a mode of emancipation, that freedom can be established in no other way. In suits other than for freedom, admissions of the former owner that he had set the alleged slave free, and even presumptions, may be resorted to, in establishing freedom. *Durham v. Durham*, xxvi. 507.

e. JUDGMENT.

18. In a suit instituted by the claimant of slaves to determine his rights as owner of said slaves, a jury was summoned and found a verdict, in these words: "We of the jury do find that the persons claimed by the petitioner as slaves are really slaves, the property of the plaintiff; and so we find for the said plaintiff the said persons in the two petitions mentioned as slaves." In entering up judgment by the court, it was not sufficient to say "that the plaintiff have the benefit of his verdict." It was the duty of the court to enter up a judgment which would show what benefit the plaintiff was to derive from his verdict. *Catiché v. St. Louis Circuit Court*, i. 608.

III. DAMAGES FOR DETENTION IN SERVITUDE.

19. In a suit for freedom by one claimed as a slave, the measure of damages is the worth of his labor during his unlawful detention, and any ill treatment during the time he has been held in slavery may be given in evidence in aggravation of damages. *Winny v. Whitesides*, i. 472.

20. In an action of trespass, &c., to recover the plaintiff's freedom, he is not entitled to damages after the suit is brought. *Tramell v. Adam*, ii. 155.

21. Trespass and false imprisonment is the proper form of action to recover the value of services rendered by a negro during the pendency of proceedings by which he was declared free. The right of recovery depends on the fact of freedom. *Gordon v. Duncan*, iii. 385.

IV. SAFETY OF PLAINTIFF PENDING SUIT.

22. The statute, (R. S. 1835, 284,) which authorizes the judge to issue a writ requiring the sheriff to bring the plaintiff before him whenever he is satisfied that there is danger that the slave will be removed out of the State, does not require that the judge shall be satisfied by the testimony of a witness; any evidence which satisfies him, or his own knowledge, is sufficient. *Anderson v. Brown*, ix. 638.

23. The proceedings under such a writ are not a part of the proceedings in the suit for freedom. *Ibid.*

FUGITIVES FROM OTHER STATES.

1. Warrants issued by the Governor for the apprehension of fugitives from justice are required to be under the seal of the State, (R. S. 1825, 406, § 1,) and if the impression of it on the warrant is so faint and imperfect as not to be intelligible, the warrant is void. *WASH, J., dis. Vallad v. Sheriff*, ii. 26.

G A M I N G .

I. CONTRACT FOUNDED ON, VOID.

II. ACTION TO RECOVER MONEY LOST.

III. ACTION AGAINST STAKEHOLDER.

I. CONTRACT FOUNDED ON, VOID.

1. A written promise to pay, in these words — “I do agree that H. W. won of me, some time last winter, seven hundred dollars in loan office certificates, at gambling, at the house of M., which I promise to pay in six months. J. L., St. Louis, July 12, 1823” — is not within the statute of 1814 providing for the prevention of vice and immorality. (*Gey. Dig.* 428, § 5.) *Waddle v. Loper*, i. 635.

2. Horse racing is a game within the meaning of the statute “to restrain gaming.” (R. S. 1825, 409, § 1.) *Shropshire v. Glascock*, iv. 536. *Boynton v. Curle*, iv. 599.

3. Although betting on the result of an election is not gaming within the meaning of the statute, (R. S. 1835, 290, § 1,) it is nevertheless immoral, and in contravention of sound policy, and the betting contract is therefore void. *Hickerson v. Benson*, viii. 8, 11. See R. S. 1855, 819, § 8.

II. ACTION TO RECOVER MONEY LOST.

4. In an action under the statute to recover money lost at gaming, (R. S. 1835, 291, § 5,) the defendant cannot, under the general issue, give in evidence matter of defense arising subsequently to the filing of the plea. *Cato v. Hutson*, vii. 142.

5. Where a bet was made in the name of the plaintiff, the fact that others were interested with him therein, does not make it necessary that they should join in the suit. *Ibid.* *Humphreys v. Magee*, xiii. 435.

6. An action will lie against the principal where the bet was made by an agent, although his name was not used in the transaction and the fact of the agency was not disclosed. *Cato v. Hutson*, vii. 142.

7. Where one of the parties to a betting contract rescinded it, but not till after it was foreseen that he must, to a moral certainty, lose, it was *held*, that he could not recover back the property lost thereon, and which had been fairly delivered to the other party. *Hickerson v. Benson*, viii. 8, 11.

8. But where the betting contract is seasonably rescinded, the party so rescinding may recover, since he is not then regarded as standing *in pari delicto*. *Ibid*.

III. ACTION AGAINST STAKEHOLDER.

9. Where a party deposits money with a stakeholder to abide the result of a bet on a horse race, he may sue at common law and recover the same at any time before the bet is determined, without reference to the act relating to gaming. *Humphreys v. Magee*, xiii. 435.

See BOND, 28;.....CHANCERY, 55;.....CONSIDERATION, 38;.....CRIMINAL LAW, 67-91;.....GARNISHMENT, 37;.....NEW TRIAL, 59;.....SECURITIES, 33.

GARNISHMENT.

I. LIABILITY TO GARNISHMENT.

II. SERVICE AND RETURN.

III. GARNISHEE'S ANSWER.

IV. GARNISHEE'S DEFENSE.

V. PROCEEDINGS.

VI. INTERPLEADER.

VII. JUDGMENT AGAINST GARNISHEE.

VIII. COSTS.

I. LIABILITY TO GARNISHMENT.

1. A debt evidenced by a promissory note, payable to order, is attachable by garnishment, but to entitle the plaintiff to a recovery against the garnishee in such a case, he must show that the principal debtor is the holder of the note and owner of the debt. *TOMPKINS, J., dis. Scott v. Hill*, iii. 88. *Quarles v. Porter*, xii. 76.

2. A sheriff who has collected money on an execution is not a debtor of the plaintiff before the return day of the execution. In such a case the sheriff can not be garnisheed as a debtor of the plaintiff, nor can the money so collected by him be attached. *Marvin v. Hawley*, ix. 378.

3. An administrator or other person holding money or property in a fiduciary

character, cannot be garnisheed for such money or property. *Curling v. Hyde*, x. 374.

4. But after an administrator upon a settlement has been adjudged to pay over a sum of money, he is subject to garnishment in a suit against the person in whose favor payment has been adjudged. *Richards v. Griggs*, xvi. 416.

5. A public municipal corporation is not, like a private corporation, liable to be garnisheed for a sum due to an officer of such corporation as a part of his salary. *Hawthorn v. City of St. Louis*, xi. 59. *Fortune v. City of St. Louis*, xxiii. 239.

6. The Bank of Missouri was summoned as the garnishee of the holder of a draft of the United States on the bank, which had funds of the Government in its hands at the time of the garnishment. There had never been a regular presentment and acceptance of the draft by the bank—*Held*, that the bank was not liable as the holder's garnishee. *BIRCH, J., dis. Janney v. Bank of Missouri*, xii. 583. *Franklin v. Bank of Missouri*, xii. 589.

7. A special deposit of coin does not constitute the depository a debtor within the meaning of the statute (R. S. 1845, 476, § 6,) so as to subject him to a garnishment upon an execution against the depositor. *Wood v. Edgar*, xiii. 451.

8. The treasurer of a corporation having its money in his hands, is not liable to garnishment in a suit against a creditor of the corporation. *Neuer v. O'Fallon*, xviii. 277.

9. The fact that the corporation has directed its treasurer to pay out of its funds in his hands a specific sum to the defendant in the attachment suit, as a mere gratuity for the benefit of third parties, will not render the treasurer liable to the process of garnishment, nor would it render the corporation thus liable. *Ibid.*

10. It is well settled that the maker of a negotiable note may be summoned as garnishee of the holder. *Colcord v. Daggett*, xviii. 557.

11. An auctioneer having in his possession a consignment for sale, cannot be garnisheed by the plaintiff in an execution suit against the owner of the goods. *Pratte v. Scott*, xix. 625.

12. A. shipped a quantity of gold dust to B., with directions to sell it and pay the proceeds to C., a creditor of A. It did not appear that C. had assented to this arrangement, or that he was advised of it. Before B. paid the money to C., he was summoned as garnishee in an attachment suit against A.—*Held*, that the money still remained the property of A., and was subject to the attachment. *Briggs v. Block*, xviii. 281.

13. Debts and wages were not exempted from garnishment to any amount under the execution law of 1847, (Acts 1846–7, 52,) and before the passage of the act of 1853. (Acts 1852–3, 103.) *Gregory v. Evans*, xix. 261.

II. SERVICE AND RETURN.

14. Where a sheriff summoned a garnishee and failed to return the names of the persons in whose presence the writ was executed as required by statute,

(1 Ter. L. 600, § 3.) the writ was not properly served, and the garnishee was not bound to appear and answer, and a judgment taken against him by default was void. *Cabeen v. Douglass*, i. 336.

15. If the sheriff summons a garnishee, without being directed to do so in the writ, his return must show what particular property of the defendants in the garnishee's hands he had levied upon, in order to justify the act of summoning. *Maulsby v. Farr*, iii. 438.

16. A return on an attachment, served by garnishment, which does not show what property in the hands of the garnishee was levied upon, is defective, and will not sustain a judgment by default. *Ibid.*

17. So where the sheriff's return showed that he had levied an attachment on some mules, &c., and without saying whose mules they were; and summoned a garnishee without levying an attachment on anything in his hands—*Held*, that the levy was bad, and that the garnishee, so summoned, was not bound to appear. (See R. S. 1825, 145, § 3.) *Anderson v. Scott*, ii. 15.

18. An attachment against a corporation under the statute, (R. S. 1835, 126, § 8,) need not contain the names of the garnishees, (R. S. 1835, 77, § 7,) nor is it necessary that the sheriff should state in his return that he was directed by the plaintiff or his attorney to summon such garnishees. *Lindell v. Benton*, vi. 361.

19. A garnishment is a species of attachment, and the first service creates the prior lien. *Talbot v. Harding*, x. 350.

20. A sheriff having five executions in his hands at the same time, in favor of different persons, and against the same defendant, served notice of garnishment upon the garnishee, in which he was required to appear and answer such interrogatories as might be filed by the several plaintiffs, naming them, touching his indebtedness to the defendant, and it was *held* sufficient. *Quarles v. Porter*, xii. 76.

III. GARNISHEE'S ANSWER.

21. Where the answer of a garnishee is not properly traversed, he should not demur, but move to dismiss. *Tuttle v. Gordon*, viii. 152.

22. The answer of a garnishee is evidence in his favor, until disproved. *McEvoy v. Lane*, ix. 47.

23. The answer of a garnishee is not governed by the rules of technical pleading. *Ashby v. Watson*, ix. 235.

24. A corporation may be summoned as a garnishee, and answer on oath by its proper officer. *Perpetual Ins. Co. v. Cohen*, ix. 416.

25. The answer of a garnishee may be disproved by evidence of his declarations made prior to his answer. [*Davis v. Knapp*, viii. 657, commented upon and explained.] *Stevens v. Gwathmey*, ix. 628.

26. The law presumes the answer of a garnishee to be true, until the contrary is made to appear by the plaintiff. *Davis v. Knapp*, viii. 657. *Quarles v. Porter*, xii. 76.

27. Under the new code, the denial of the answer of a garnishee need not be verified by affidavit. *Stewart v. Anderson*, xviii. 82. *Briggs v. Block*, xviii. 281.

IV. GARNISHEE'S DEFENSE.

28. A., having given his note to B., was summoned as garnishee in a suit against B., and a recovery had. In an action by C. (to whom B. had assigned the note before the attachment,) against A., the record of the recovery against him as garnishee is a good bar to the action; and the fact that C. has exchanged the note for four smaller ones, amounting to the same sum, and for the same consideration, does not vary the case. *Wolf v. Cozzens*, iv. 431.

29. The garnishee, in his answer, stated "that he had purchased a note of a certain date and amount, given by the defendant in the execution, and assigned to the garnishee before he was summoned, and therefore, he owed the defendant nothing." This will authorize the garnishee to prove that he had a bond, or any other claim against the defendant, exceeding his debt to defendant. *Ashby v. Watson*, ix. 235.

30. A garnishee cannot take advantage of an error in the proceedings against the principal debtor, where the court has jurisdiction of the cause. *Perpetual Ins. Co. v. Cohen*, ix. 416.

31. An answer of a garnishee, admitting that he had been indebted to A., but that, before he was summoned, an agreement had been made between himself, A. and B., (a creditor of A.,) that the amount due from him to A. should be paid to B., is evidence to show that he was not indebted to A. at the time he was summoned. *Black v. Paul*, x. 103.

32. A garnishee may set up the statute of limitations as a defense to his indebtedness. *Benton v. Lindell*, x. 557.

33. Where the maker of a note is notified of its assignment, and is afterwards summoned as a garnishee, the assignment constitutes a valid defense to the garnishment. If, however, this defense proves unavailing, and judgment is rendered against him, it cannot affect the right of the assignee to recover the debt. [*Bates v. Martin*, iii. 367, and *Wolf v. Cozzens*, iv. 431, commented upon.] *Giles v. Kirby*, xiii. 157. *Funkhouser v. How*, xxiv. 44. *Dickey v. Fox*, xxiv. 217.

34. The Home Mutual Insurance Co. was not liable to execution till three months after judgment against it. After judgment against it, a creditor of the plaintiff in the judgment, garnisheed the company, and afterwards, within the three months, the plaintiff in the judgment took out execution, and the company paid the amount of it to him—*Held*, that they could not thus avoid their liability under the garnishment, by paying an execution which might have been quashed. *Home Mutual Ins. Co. v. Gamble*, xiv. 407.

35. Where a party defends on the ground that he has been charged and paid the debt as garnishee, he must show that the debt sued on, and that for which he was charged as garnishee, are the same. *Dirlam v. Wenger*, xiv. 548.

36. A judgment cannot be rendered against a garnishee on a note that was

assigned to another, before the service of the garnishment. *Walden v. Valiant*, xv. 409.

37. Where a stakeholder, in a wager, is summoned as garnishee of the winning party, and the wager was determined without any demand upon the garnishee by the losing party for the money deposited with him, and he makes no claim, judgment will be given against the garnishee for the whole amount in his hands. *Wimer v. Pritchard*, xvi. 252.

38. To constitute a valid assignment of a debt not evidenced by bond, bill or note, as against the debtor, notice must be given to him; and if, after an assignment without notice, judgment is obtained against him as garnishee, in a suit against his original creditor, he will be protected. *Richards v. Griggs*, xvi. 416.

39. A deed of trust executed by the garnishee to the defendant in the execution, reciting that the former was indebted to the latter in the amount of a negotiable note which the deed was given to secure, is sufficient evidence to authorize a judgment against the garnishee, his answer not positively denying that the defendant was the holder of the note, and no other person asserting a claim to it at the trial, although it was then long past due. *Colcord v. Daggett*, xviii. 557.

40. Where a garnishee, summoned on a *fi. fa.*, alleges an assignment of the debt by the defendant, an issue may be made between the plaintiff and garnishee to try the question of fraud in the assignment. *Daggett v. St. Louis Marine and Fire Ins. Co.*, xix. 201.

41. A. drew a bill of exchange on B., in favor of C., payable out of funds in his hands. The next day, B. promised C. to pay him on the bill whatever might be in his hands, due to A. Afterwards B. was summoned as garnishee or trustee. And after this, the bill of exchange being presented to B., he refused to accept it—*Held*, that such bill of exchange cannot, before acceptance, take effect as an equitable assignment of the fund. *Kimball v. Donald*, xx. 577. *Engler v. Rice*, xx. 583.

42. Where a garnishee has notice of an assignment of the debt, and fails to set up this matter as a defense, and a judgment is rendered against him, and he pays the money to the attaching creditor, the assignee is not entitled to recover the amount so paid from such attaching creditor, although such creditor had notice of the assignment during the pendency of the garnishment. *Scott, J. dis.* [*Colcord v. Daggett*, xviii. 557, *OVERRULED.*] *Funkhouser v. How*, xxiv. 44.

43. And, *quære*, whether a garnishee who fails to state in his answer the fact of a previous assignment of the debt, and who had no notice of such assignment, is entitled to relief against a judgment against him as garnishee. *Marmaduke v. McMasters*, xxiv. 51.

V. PROCEEDINGS.

44. The Supreme Court will not interfere with the discretion exercised by inferior courts in the matter of permitting allegations and interrogatories to

garnishees to be filed after the regular time has elapsed, but before the end of the term. *Briggs v. Block*, xviii. 281.

45. Where the plaintiff sued a contractor, and brought in the Pacific R. R. Co. as garnishee, it was *held*, that the burden of proof rested on the plaintiff to show that the railroad company was liable to the contractor, should an action be brought against it by the contractor. *Reagan v. Pacific Railroad Co.*, xxi. 30.

VI. INTERPLEADER.

46. A party cannot interplead in a cause to claim assets in the hands of a person summoned as garnishee on execution. If the garnishee is in doubt as to who is his creditor, he may bring in all persons interested, and thus relieve himself. *Wimer v. Pritchard*, xvi. 252.

See SUPRA, 40.

VII. JUDGMENT AGAINST GARNISHEE.

47. A judgment against a garnishee for a sum larger than the amount of the plaintiff's judgment against the principal debtor is not erroneous. *Scott v. Hill*, iii. 88.

48. Where a judgment is rendered against a garnishee by default, under the statute, (R. S. 1835, 86, § 17.) the plaintiff must establish, by competent proof, the amount of his indebtedness to the defendant, and final judgment can only be rendered against him for the amount of his actual indebtedness to the defendant. *Brotherton v. Anderson*, vi. 388.

49. Where, in such a case, a justice renders final judgment against a garnishee for the amount of the plaintiff's claim, without any proof of the indebtedness of the garnishee to the defendant, the judgment is irregular, and the irregularity is not cured by lapse of time. *Ibid*.

50. A judgment by default against a garnishee does not authorize proof of a joint indebtedness of him and another to the defendant, and, in such case, the assignment by the other of his interest in the indebtedness (being an open account) to the defendant, will make no difference. *Kingsley v. Missouri Fire Co.* xiv. 465.

51. A Justice may render judgment against a garnishee for an amount within his jurisdiction, although the indebtedness of the garnishee to the defendant exceeds his jurisdiction. *Doggitt v. St. Louis Marine and Fire Ins. Co.*, xix. 201. See SUPRA, 36.

VIII. COSTS.

52. Under the act of 1847, (Acts 1846-7, 9, § 1,) a garnishee is not entitled to an allowance for the fees of an attorney, but only for his own time and trouble in answering. *Stewart v. Anderson*, xix. 478.

53. To entitle a garnishee to indemnification for expenses incurred by him, it is not necessary that he should appear and answer in the garnishment proceeding. *Bain v. Chrisman*, xxvii. 293.

See ATTORNEY AT LAW 1 ; . . . INTEREST, 6, 7 ; . . . JUDGMENT, 32.

G I F T.

1. A., by deed of gift, granted to B. and C. certain slaves, each donee to take certain of them in severalty, and in case of the death of either "without heirs," the title to the slaves granted to him was to pass to and vest in the survivor absolutely—*Held*, that the gift was a grant of the entire property and title of the donor in the slaves to the first donee, and that the limitation over to take effect upon his death was void. *Wilson v. Cockrill*, viii. 1. *Wilson v. Mann*, viii. 8.

2. *Quære*, whether such limitation would have been void if created by will, or by conveyance under the statute of uses. *Wilson v. Cockrill*, viii. 1.

3. The condition in a gift of a chattel that the donee shall have children is a valid one ; if the donee has issue, the gift becomes absolute—if not, the property reverts to the donor. *Halbert v. Halbert*, xxi. 277.

4. V., by deed of gift in 1837, conveyed a female slave to his grand-daughter and "her heirs forever." A subsequent clause of the deed provided that if the donee die leaving no lawful issue, the slave and her increase should be equally divided among the sons and daughters of V.—*Held*, that the granddaughter took an absolute estate, and the remainder was void as tending to create a perpetuity. *Vaughn v. Guy*, xvii. 429.

5. By a deed of gift certain slaves were conveyed to M. W., a daughter of the grantor, thus: "to the said M. W., and to her bodily issue, and no way else, &c., to have and to hold unto the said M. W. and her bodily issue forever, &c., though with this condition, and such is the express meaning and intent of this instrument, that the above named slaves are to remain with and be kept in the possession of the said M. W., for and during her natural life ; and after her death, the said slaves, with their increase, to be equally divided between the heirs and issue of the body of the said M. W., anything to the contrary herein contained notwithstanding"—*Held*, that this deed created a life interest in M. W., with remainder to her children. *Hayden v. Stinson*, xxiv. 182.

See EVIDENCE, 8, 11 ; . . . FRAUDULENT CONVEYANCES, I ; . . . HUSBAND AND WIFE, 61 ; . . . PRACTICE, 143.

G U A R A N T Y.

I. CONSTRUCTION.

II. CONSIDERATION.

III. NOTICE.

IV. DISCHARGE OF GUARANTOR.

I. CONSTRUCTION.

1. Where, in a letter, a person authorized states to his correspondent that it is expected that a certain boat will be ready to run at a certain time, and wishes his services as clerk, the letter cannot be considered as a guaranty that the boat shall be ready at that time. *Johnson v. McCune*, xxi. 211. *Same case*, xxvii. 171.

2. A pork packer engaged to "examine, salt, brine, repack and brand" a lot of meat, and to "guarantee New Orleans inspection"—*Held*, that this agreement amounted to a guaranty that the pork should pass inspection in New Orleans as branded by the packer. *Warren v. Palmer*, xxiv. 78.

II. CONSIDERATION.

3. A guaranty of the payment of a note, need not express upon its face the consideration for which it was given. *Little v. Nabb*, x. 3.

4. An agreement guaranteeing the performance of a contract previously entered into with another, though in writing, must have a consideration to be valid and binding. *Pfeiffer v. Kingsland*, xxv. 66.

III. NOTICE.

5. In an action upon a guaranty not absolute on its face, the plaintiff must show his acceptance of it and notice thereof to the maker. *Smith v. Anthony*, v. 504.

6. At the foot of a bill of lumber for a boat, was an order thus: "Messrs. R. (plaintiffs) will furnish the above bill as soon as possible, and I will order what more I want for my boat in a short time, (signed) J. McC." Underneath the order was this: "I hereby guarantee the payment of the above bill. January 29, 1842. (Signed) W. C." The lumber was delivered, and while the boat was building, W. C. was frequently present as a visitor, but took no part in the matter—*Held*, that the obligation of W. C. was that of a guarantor, and that he was entitled to notice of the acceptance of the guaranty, (which may be shown by circumstances,) and of McC.'s failure to pay on demand, and that such demand should be made and notice given in a reasonable time. *Scott, J., dis. Rankin v. Childs*, ix. 665.

IV. DISCHARGE OF GUARANTOR.

7. A. sold to B. certain merchandise at St. Louis, and agreed to ship it to New York, consigned to C., and agreed also to draw on C., for the value at ninety days, in favor of B., the merchandise to be sold to meet the payment of the drafts. D., referring to the bargain between A. and B., promised A. to pay him any reclamation he might have against B., arising from sales of said merchandise. The merchandise was shipped and arrived, and the drafts were made

according to agreement; but by an arrangement between B. and C., the merchandise was not sold to meet payment of the drafts, but the sale was deferred, and, when sold, it brought less than the amount of the drafts—*Held*, that the writing of D. was a guaranty, and he was discharged by the arrangement made between B. and C., postponing the sales. *GAMBLE, J. dis. Fisher v. Cutter*, xx. 206.

GUARDIANS AND CURATORS.

I. APPOINTMENT.

II. GUARDIAN'S DUTIES.

III. AUTHORITY.

IV. SALE OF WARD'S REAL ESTATE.

V. BOND.

VI. REMOVAL OF GUARDIAN.

VII. DISTRIBUTION OF DECEASED WARD'S ESTATE.

VIII. CURATOR'S SETTLEMENT.

IX. PARTIES TO ACTION.

I. APPOINTMENT.

1. A curator of the estate of a minor cannot be appointed by the County Court of a county in which such minor does not reside. *Lacy v. Williams*, xxvii. 280.

II. GUARDIAN'S DUTIES.

2. A guardian is bound to comply with the statutory provisions affecting the duties incident to the trust, as they are enacted. *Finney v. The State*, ix. 225.

III. AUTHORITY.

3. A guardian has not power to release a debt due to his ward. *Horine v. Horine*, xi. 649.

4. Where the same person is executor of an estate and guardian of a distributee, and there is nothing to show in which capacity he holds funds, after payment of the debts and settlement of the estate, he will be presumed to hold them as guardian. *The State v. Hearst*, xii. 365.

IV. SALE OF WARD'S REAL ESTATE.

5. Under the Spanish laws, a guardian might purchase the lands of his ward by permission of the judge. *McNair v. Hunt*, v. 300.

6. Upon petition under the statute relating to minors, orphans and guardians, (R. S. 1825, 417, § 7,) which statute conferred upon the Probate Court power to authorize guardians to sell real estate of minors, at private sale, to complete their education, the court ordered, May 4, 1835, that the guardian, after an appraisal by three disinterested householders, should sell the lot at private sale for not less than three-fourths of its appraised value, and should make report of his proceedings at the next term of the court. After the next term, the guardian made a private sale of the lot for more than the appraisement, and executed a deed, Oct. 3, 1835, to the purchaser; but he made no report whatever to the court of the sale, or of his action under the order—*Held*, that the failure of the guardian to make a report, did not invalidate the title of the purchaser; nor would the fact that the sale was made subsequent to the term at which the guardian was directed to report, invalidate such sale. *Robert v. Casey*, xxv. 584.

7. And the original affidavit of the appraisers and their written appraisement, and the deed of the guardian, though never reported to the court, are admissible in evidence to show the proceedings of the guardian under the order of the court. *Ibid*.

V. BOND.

8. A final settlement of a curator's account in the County Court, being equivalent to a judgment of a court of competent jurisdiction, is a good defense to an action at law on his bond. Such settlement can only be reached and reviewed by a bill in equity. *Oldham v. Trimble*, xv. 225. *The State v. Roland*, xxiii. 95. *Mitchell v. Williams*, xxvii. 399.

9. Where two successive bonds were given for the faithful management of a curator, and the plaintiff sued on the first, it was *held*, that *prima facie* the security on the last bond was liable, but that the plaintiff might show that the money was converted during the existence of the first bond. *The State v. Paul*, xxi. 51.

10. A guardian died, and final settlement of his guardianship account was made by his administrator, and by such settlement a certain sum was found to be due to the ward—*Held*, in a suit on the guardian's bond, that this settlement by the administrator was binding on the estate of the guardian, and created a *prima facie* liability on the part of his sureties. *The State v. Grace*, xxvi. 87.

11. An action on a guardian's bond must be brought in the name of the State. *Mitchell v. Williams*, xxvii. 399.

VI. REMOVAL OF GUARDIAN.

12. An order of a County Court removing a guardian, and appointing his successor, is equivalent to an order to pay over to his successor any money in the hands of the one removed, and he is bound to take notice of the order. *Finnely v. The State*, ix. 225.

13. The County Court is authorized to revoke the appointment of a guardian for non-residence in the State, although the statute which makes this a cause for removal was passed subsequent to the appointment of the guardian. (See Acts 1838-9, 58, § 15.) *Finney v. The State*, ix. 225.

VII. DISTRIBUTION OF DECEASED WARD'S ESTATE.

14. The prohibition in the statute relating to guardians and curators, against the issuing of letters of administration on the estate of a deceased minor, (R. S. 1845, 552, § 27,) applies to those cases only where there are no debts except those which the guardian himself has allowed to be created, and does not apply where there are demands for which the minor would have been liable to an action. *George v. Dawson*, xviii. 407.

VIII. CURATOR'S SETTLEMENT.

15. No distinction exists between an administrator and a curator as to the settlement of their accounts, and although the settlement of the accounts of a curator had been sanctioned by the County Court, and are regarded as *prima facie* correct, yet it does not prevent the ward from filing a bill in equity, surcharging and falsifying his accounts. *Oldham v. Trimble*, xv. 225. *The State v. Roland*, xxiii. 95.

16. Such proceeding can be sustained only by proof that the allowance and settlements were fraudulently procured. *Mitchell v. Williams*, xxvii. 399.

IX. PARTIES TO ACTION.

17. A suit on behalf of a lunatic must be brought in his name, (by his guardian,) and not in the name of the guardian. *Reed v. Wilson*, xiii. 28.

HABEAS CORPUS.

1. Where a free negro, who had been duly tried and committed under the statute, (R. S. 1835, 416, §§ 21, 22,) was brought before the Supreme Court on *habeas corpus*, the court declined looking into the correctness of the decision made by the committing magistrate, as the statute provided other modes of reviewing it, and the *habeas corpus* act having no reference to commitments after a regular trial by competent judicial authority. *Stoner v. The State*, iv. 614.

2. Where a person, committed for any offense, is brought before a court of

magistrate under the *habeas corpus* act, he cannot be discharged for any "informality, insufficiency or irregularity of the commitment;" therefore, where a person was charged in the commitment with the commission of manslaughter, and it appeared that the offense was an assault with intent to kill, the magistrate, before whom the prisoner was brought, properly described the offense in the recognizance as an assault with intent to kill. (See R. S. 1835, 303, § 13.) *Snowden v. The State*, viii. 483.

3. An appeal will not lie from the refusal of the court to discharge a prisoner, on a writ of *habeas corpus*. *Howe v. The State*, ix. 682.

4. A negro, convicted and sentenced as a free negro to imprisonment in the penitentiary, cannot be discharged on a *habeas corpus*, on the petition of a person alleging such convict to be his slave. *Ex parte Toney*, xi. 661.

5. Neither the Supreme Court, nor any other court or judge, can, on a petition for a *habeas corpus*, investigate the legality of a conviction in, or a judgment of a court of competent jurisdiction. *Ibid.*

6. A prisoner will not be released on *habeas corpus* because the jury, before whom he had been once tried on an indictment for a capital offense, was discharged by the court for disagreement before the end of the term, without his consent and in his absence. *Ex parte Ruthven*, xvii. 541.

7. The Circuit Court, or a judge thereof, has authority to issue a writ of *habeas corpus* in vacation, and if such court or judge order the prisoner to be discharged, however improper or erroneous the officer having charge of the prisoner may discharge him, and will not be liable for so doing. *Martin v. The State*, xii. 471.

8. A commitment, which states that the party committed was adjudged guilty of a contempt in refusing to answer questions while giving his deposition as a witness, plainly and specially charges a contempt, although it does not in terms state that the questions were relevant or were decided to be relevant. *Ex parte McKee*, xviii. 599.

HEIRS.

1. The term "heir" does not always refer to a person whose ancestor is dead, but it is often used to designate the presumptive heir of a person in existence. Thus, in a note payable on demand to "the heirs of A.," A. being alive, it may be shown by averment that the presumptive heirs of A. were intended. *Cox v. Beltzhoover*, xi. 142.

2. A decree against the heirs of a fraudulent purchaser, should impose no penalty upon them for the improper conduct of their ancestor, but in adjusting the rights of the parties, the improvements made by the ancestor, if equal to, should be set off against the rents and profits of the estate purchased. *Smith v. Isaac*, xii. 106.

See ACTION, 36; . . . ADMINISTRATION, 25; . . . EVIDENCE, 133, 134.

HUSBAND AND WIFE.

I. MARRIAGE.

- a. CONSENT OF PARENT OR GUARDIAN.
- b. INDICTMENT FOR MARRYING MINOR WITHOUT.
- c. QUI TAM ACTION FOR.
- d. ACTION FOR BREACH OF PROMISE OF MARRIAGE.

II. MARRIAGE SETTLEMENTS AND CONTRACTS.

- a. GENERALLY.
- b. UNDER FRENCH AND SPANISH LAW.

III. HUSBAND'S RIGHTS IN AND POWER OVER WIFE'S PROPERTY.

IV. LIABILITY OF HUSBAND FOR DEBTS OF WIFE.

V. CURTESY.

- a. ESTATE BY.
- b. CONVEYANCE OF.

VI. RIGHTS AND DISABILITIES OF WIFE AND LIABILITY OF HER PROPERTY ON HER DEBTS AND CONTRACTS.

VII. WIFE AS AGENT OF HUSBAND.

VIII. DEALING WITH WIFE APART FROM HUSBAND.

IX. CONVEYANCES BY AND TO HUSBAND AND WIFE.

- a. TO EACH OTHER.
- b. BY GIFT FROM HUSBAND TO WIFE.
- c. TO HUSBAND AND WIFE IN FEE.
- d. IN TRUST TO HER SEPARATE USE.
- e. OF HER ESTATE AND HER HUSBAND'S INTEREST THEREIN.
- f. ACKNOWLEDGMENT OF DEED BY WIFE.
 - aa. When Conveying her Estate.
 - bb. On Relinquishment of Dower.
- g. SURVIVORSHIP.

X. COMMUNITY PROPERTY UNDER THE FRENCH AND SPANISH LAW.

XI. ACTION BY AND AGAINST HUSBAND AND WIFE.

- a. GENERALLY.
- b. BY THE WIFE ALONE.

XII. MARITAL RIGHTS DETERMINED BY WHAT LAW.

XIII. ARTICLES OF SEPARATION.

XIV. DIVORCE AND ALIMONY.

- a. CAUSES OF DIVORCE.
 - aa. Adultery.
 - bb. Absence for two years.
 - cc. Personal Indignities.
 - dd. Cruel and Barbarous Treatment.
 - ee. Condonation.
- b. JOINDER OF CAUSES OF DIVORCE.
- c. REQUISITES OF THE BILL OR PETITION.
- d. CROSS-BILL.
- e. RESIDENCE OF COMPLAINANT.
- f. EVIDENCE.

- g. BAR TO THE ACTION.
 - h. EFFECT OF DIVORCE.
 - i. GUILT OF BOTH PARTIES.
 - j. SETTING ASIDE DECREE OF DIVORCE.
 - k. ALIMONY AND MAINTENANCE.
-

I. MARRIAGE.

a. CONSENT OF PARENT OR GUARDIAN.

1. The statute which prohibits the marrying of a minor without the consent of the parent, guardian, or other person having the care or government of such minor, (R. S. 1835, 401, § 7,) limits the power of consent to one person, and does not give it to each of the persons mentioned in the act, but only to that one who has the care or government of the minor at the time of marriage. *Vaughn v. McQueen*, ix. 327.

2. Where there is a guardian, the parent cannot consent so as to justify the person solemnizing the marriage. *Ibid.*

b. INDICTMENT FOR MARRYING MINOR WITHOUT.

3. In framing an indictment under § 8 of the statute relating to marriages, (R. S. 1845, 730,) it is not sufficient to pursue the language of the act; the indictment should specifically state the acts committed by the defendant, to enable the court to determine whether he has violated the law. *The State v. Winright*, xii. 410.

4. An indictment under the statute, (R. S. 1855, 1062, § 7,) charging that the defendant, a minister of the gospel, unlawfully joined in marriage a minor, "without then and there having the certificate or presence and consent of the parent or guardian, or other person having the care and government of such minor," is insufficient. *The State v. Ross*, xxvi. 260.

c. QUI TAM ACTION FOR.

5. In a *qui tam* action to recover the statute penalty for marrying a minor, without the consent or presence of parent or guardian, the burden of proof of consent is on the defendant. TOMPKINS, J., *dis.* *Medlock v. Brown*, iv. 379.

6. Such action will lie only against him who solemnizes the marriage, and not against aiders or advisers. *Alsop v. Ross*, xxiv. 283.

d. ACTION FOR BREACH OF PROMISE OF MARRIAGE.

7. In an action for breach of promise of marriage, seduction may be given in evidence in aggravation of damages. TOMPKINS, J., *dis.* *Green v. Spencer*, iii. 318. *Hill v. Maupin*, iii. 323.

8. And, also, evidence of the plaintiff's general character before the seduction. *Green v. Spencer*, iii. 318.

9. An offer to marry may be inferred from the statement of the plaintiff to the

defendant, that she "was ready to marry and had made preparation for the occasion, and was as ready as she ever would be." *Green v. Spencer*, iii. 318.

10. Where a plaintiff joins in her petition a count for breach of promise of marriage, and a count for seduction, the latter may be disregarded altogether, and the judgment will not be reversed because evidence was offered in support of the second count, which increased the damages, if it could have been introduced under the first count with the same effect. *Roper v. Clay*, xviii. 383.

11. Where the plaintiff averred, in her petition, that, at the special instance and request of the defendant, she had promised to marry him, (without averring that the defendant had promised to marry her,) and "that the defendant, not regarding his said promise and undertaking, but contriving to injure and deceive the plaintiff, had married another person"—*Held*, that the omission was cured by the verdict, although it would have been bad on demurrer. *Ibid*.

12. It is no defense to an action for a breach of promise of marriage, that the plaintiff had previously contracted to marry another person. *Ibid*.

13. A petition in an action for breach of promise of marriage, alleging that about a certain specified date, "the defendant, in consideration that the plaintiff, then being sole and unmarried, at the request of the defendant, faithfully promised to marry the defendant—did then and there undertake and faithfully promise to marry the plaintiff; that, confiding in the said promise and undertaking of said defendant, plaintiff has remained and continued and still is sole and unmarried, and has always been and still is ready and willing to marry the defendant; that, though a reasonable time has elapsed since said promise and undertaking for the defendant to marry plaintiff, and although requested so to do, he has wholly neglected and refused, and still does neglect and refuse," &c., is good after verdict on motion in arrest of judgment. *Davis v. Slagle*, xxvii. 600.

14. Where a defendant, in an action for breach of promise of marriage, attempts, in answer, to justify his non-compliance with his contract by charging that the character of the plaintiff for virtue is bad, the fact that this imputation is unwarrantably made, is a circumstance that aggravates the damages; and the jury may take the same into consideration in estimating the damages. *Ibid*.

II. MARRIAGE SETTLEMENTS AND CONTRACTS.

2. GENERALLY.

15. Ante-nuptial agreements, conveying the property of the wife to a trustee, subject to her sole use and disposition, are valid, and the husband has no right in or to the same, either before or after her death. *Pratt v. Wright*, v. 192.

16. By an ante-nuptial contract, by which property of the intended wife was conveyed in trust for her sole use and benefit, with full power to dispose of the same by will, all her estate and interest are conveyed absolutely and indefinitely, so that, in the event of her decease without having made any disposition of the property so conveyed, it devolves by statute upon her kin by blood, to whom the husband is postponed. *Wright v. Pratt*, xvii. 43.

17. Under a marriage contract entitling the wife to a life estate in certain slaves, with power of disposal by will or otherwise during coverture, and free from liability for her husband's debts, her estate is absolute. *Logan v. Logan*, xix. 465.

18. An ante-nuptial agreement that the wife, at her death, may dispose to her son certain chattels, does not vest them in the wife, but only gives her a power of appointment. *Agee v. Agee*, xxii. 366.

19. A marriage contract is binding between the parties thereto, although not acknowledged or proved and recorded. *Logan v. Phillips*, xviii. 22.

20. A stipulation in a marriage contract, that in case the wife should survive the husband, she should receive from his estate the sum of \$200, is valid, and she may maintain a suit thereon against her deceased husband's representatives. *Vogel v. Vogel*, xxii. 161.

b. UNDER FRENCH AND SPANISH LAW.

21. With reference to the custom of Paris relative to marital communities, the parties contracted that "the said future spouses take each other, with their property and all the right now actually belonging to them, and also those which may fall to or appertain to them, &c., which property shall wholly enter into the community," &c.—*Held*, that the words "which property," &c., applied only to that which came to them during marriage. *Childress v. Cutter*, xvi. 24.

22. Spanish marriage contracts are within § 5 of the act of 1825, relating to marriage contracts. (R. S. 1825, 526). [*OVERRULING McNair v. Dodge*, vii. 404, and *Hensley v. Dodge*, vii. 479.] *Wilkinson v. Rozier*, xix. 443.

23. As to the construction of a marriage contract entered into in 1797. *Wilkinson v. American Iron Mountain Co.*, xx. 122.

24. By the Spanish law, which prevailed here as early as 1777, persons about to be married could not, by marriage contract, introduce a foreign law, (as for example the French law,) to regulate their property relations as husband and as wife, as by stipulating for the establishment of a community between the parties according to the custom of Paris. *Cutter v. Waddingham*, xxii. 206.

25. A. and B. being about to marry, entered into a marriage contract, dated Aug. 5th, 1777, containing clauses the translation of which is in these words: "the said future spouses to be one and common in all moveable property and immovable conquests, (*en tous biens meubles, et conquêts immeubles*,) according to the ancient custom established in this colony, to which they submit themselves by force of the present contract;"—"the said future spouses take each other with the property and rights to them now belonging, and such as may happen to come and belong to them hereafter, whether by succession, gift, legacy, or otherwise, which property, from whichever side it may come to them, shall enter wholly into community without any reserve"—*Held*, that these clauses were ineffectual to bring a lot of land owned by the husband at the time of the marriage, into a conjugal community, in any such sense that, on the death of the husband, the wife would be entitled to one half thereof. *Ibid.*

III. HUSBAND'S RIGHTS IN AND POWER OVER WIFE'S PROPERTY.

26. A relinquishment by the husband of his wife's distributive share in certain lots belonging to an estate, to a co-heir, is no bar to the husband's right to subject the same lots to the payment of a demand due to himself from the deceased. *Morton v. Massie*, iii. 482.

27. Where a wife becomes entitled to a distributive share of her father's estate, and dies before her husband has reduced the same to possession, such share will go to her heirs, and not to her husband. *Leaky v. Maupin*, x. 368.

28. A husband is not entitled under our statutes to the choses in action of his wife, not reduced into possession during her life. As where the wife, being entitled to a distributive share of her father's estate, died before the same was received by the husband, he is not entitled to such share, but the same will go to her heirs. *Ibid.* *Gillet v. Camp*, xix. 404.

29. A bond given to a *femme sole*, can only be reduced to possession by her husband by his receiving satisfaction of the debt, or by changing the security; and it is not reduced to possession by the husband taking possession of it during her life, and after her death transferring it to another. *Pickett v. Everett*, xi. 568.

30. The personal savings and profits made by the wife, and which her husband allows her to apply to her own separate use, in equity vest in her as against the claim of her husband and his legal representatives. *Gentry v. McReynolds*, xiii. 533.

31. If the husband sells a chattel bequeathed to his wife for life, before it is delivered to him by the executor, and the purchaser takes and retains the possession thereof, it is such a reduction of property to possession by the husband as bars the wife's right of survivorship. *Abington v. Travis*, xv. 240.

32. The act of 1849, which exempts property of a married woman from sale under execution against her husband in certain cases, (Acts 1848-9, 67, § 1,) does not affect the right of the husband to receive and dispose of his wife's property. *Boyce v. Cayce*, xvii. 47.

33. The possession by a husband of property in which his wife had a life estate, does not necessarily, immediately on her death, become adverse to the remainderman. Possession of personal property must be adverse in order to be protected by the statute of limitations. *McLain v. Winchester*, xvii. 49.

34. A gift or bequest of a chattel to the husband and wife vests the entire property in the husband. *Polk v. Allen*, xix. 467.

35. Where a slave was bequeathed to a wife for her life, her husband, though in possession, cannot convey an absolute estate to a purchaser. *Robinson v. Rice*, xx. 229.

36. Where the husband is in possession of personal property bequeathed to his wife by a former husband, as administrator of such former husband, and he makes a final settlement, and it is ordered by the court that he and his wife retain all the estate of deceased in their hands, the husband's possession as administrator thereupon ceases, and his possession, *jure mariti*, commences at the date of such order; but this would not be a reduction into possession of a bond

or note for the wife's money taken by him as administrator. *Walker v. Walker*, xxv. 367.

37. If personal property of the wife, other than choses in action, be in such a situation that the husband may lawfully take it into his hands at any moment, this is a sufficient reduction into possession, although he should not take it into his actual custody. *Ibid.*

38. By the law of Kentucky in the year 1830, where an interest in a chattel vests in the wife, whether in remainder or otherwise, although not reduced to possession by the husband, passes to him upon her death in case he survives her. *Houck v. Camplin*, xxv. 378.

See EXECUTION, 31-35.

IV. LIABILITY OF HUSBAND FOR DEBTS OF WIFE.

39. After a decree of alimony, *pendente lite*, the husband is not chargeable with debts contracted by the wife. *Bennett v. O'Fallon*, ii. 69.

40. The husband is not liable for money left with his wife without his consent, and which she applies to her own use. *Per* SCOTT, J. *Andrews v. Ormsbee*, xi. 400.

See INFRA, VIII; . . . LANDLORD AND TENANT, 41.

V. CURTESY.

a. ESTATE BY.

41. A. conveyed a tract of land to B. (the wife of C.) and "to the heirs of her body"—*Held*, that by the statute, (R. S. 1825, 216, § 4,) she took only a life estate in the premises; and that upon her death her husband did not become a tenant by curtesy. *Burris v. Page*, xii. 358.

42. In this State a husband is entitled to curtesy in the equitable estate of his wife. *Alexander v. Warrance*, xvii. 228.

43. The estate of tenancy by the curtesy is coeval, in this State, with dower, and both were introduced by the act of July 4, 1807. (1 Ter. L. 128, §§ 6, 15.) *Reaume v. Chambers*, xxii. 36.

44. Actual seizin of the wife's land is not necessary to entitle the husband to curtesy. *Ibid.* *Harvey v. Wickham*, xxiii. 112. *Stephens v. Hume*, xxv. 349.

b. CONVEYANCE OF.

45. Where a tenant by the curtesy executes a conveyance which operates to transfer an estate for the life of the grantor, so long as this estate is outstanding, it prevents a recovery of the land by those claiming under the wife of such tenant. *Reaume v. Chambers*, xxii. 36.

46. Where a tenant by the curtesy makes a conveyance that would, if he were seized in fee, give the grantee an estate for his (grantee's) life, the grantee takes an estate for the life of the grantor. *Ibid.*

See INFRA, 98.

VI. RIGHTS AND DISABILITIES OF WIFE, AND LIABILITY OF HER PROPERTY ON HER DEBTS AND CONTRACTS.

47. A married woman is not liable on a note executed by herself, although her husband has been absent from the State many years and left her to live upon her own means. *Chouteau v. Merry*, iii. 254.

48. A *femme covert* is regarded in equity, as to her separate property, as a *femme sole*. *Coats v. Robinson*, x. 757.

49. Where a *femme covert* gives a note or bond, it is presumed that she intends to charge her separate property. *Ibid*.

50. A married woman executed a promissory note jointly with her husband, and although it did not appear on what account the note was executed, whether for the benefit of the wife or of the husband, or for their joint benefit, equity would subject real estate held to the separate use of the wife to the payment thereof, and would decree a sale for that purpose. *Whitesides v. Cannon*, xxiii. 457. *Segond v. Garland*, xxiii. 547.

51. The indorsement by a married woman of a bill of exchange or promissory note made payable to her order, in the presence of and with the consent of her husband, will pass the title. *Menkens v. Heringhi*, xvii. 297. *McClain v. Weidemeyer*, xxv. 364.

52. And such consent is sufficiently shown if it appear that the note was executed to her in consideration of the transfer by her to the maker of the note of a bill of exchange transmitted to her from her husband, who was absent in California. *McClain v. Weidemeyer*, xxv. 364.

SEE *INFRA*, 66.

VII. WIFE AS AGENT OF HUSBAND.

53. The wife may be the agent of her husband, and her acts and statements in the transaction of the business within the scope of her agency are admissible in evidence. *Singleton v. Mann*, iii. 464.

54. Where a wife, who in the absence of her husband usually acts as his agent, borrows money and purchases property with it which he afterwards possesses and claims, he will be bound to pay the money borrowed. *Burk v. Howard*, xiii. 241.

VIII. DEALING WITH WIFE APART FROM HUSBAND.

55. Persons dealing with a married woman living apart from her husband, give her credit at their peril. *Bennett v. O'Fallon*, ii. 69.

56. Where the wife lives apart from her husband, and that fact is known to the party dealing with her, the husband is not liable for articles furnished her unless it appears that he consented to the separation, or had by his own misconduct induced it. *Rutherford v. Cox*, xi. 347. *Reese v. Chilton*, xxvi. 598.

57. If the husband makes a reasonable allowance to the wife for necessities during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable unless the tradesman can show that the allowance was not supplied; otherwise if the tradesman has no notice. *Hurshaw v. Merryman*, xviii. 106.

58. Where a merchant furnishes goods to the wife while living separate and apart from her husband, he does so at his peril. It is no defense that he was not aware of the separation. *Porter v. Bobb*, xxv. 36.

59. If the wife leave her husband without cause, he will not become liable, by receiving her back, for necessities supplied to her during her unlawful absence. *Reese v. Chilton*, xxvi. 598.

IX. CONVEYANCES BY AND TO HUSBAND AND WIFE.

a. TO EACH OTHER.

60. The legal unity of husband and wife prevents their mutually releasing to each other, by deed of partition, their respective interests in land. *Frissell v. Rozier*, xix. 448.

b. BY GIFT FROM HUSBAND TO WIFE.

61. At law a husband cannot make a gift direct to his wife; and though equity, where the intent is clear that she shall enjoy the property separately, will interfere and constitute the husband a trustee, and compel him to execute the trust, yet the proof of the trust must be clear and unequivocal. *Walker v. Walker*, xxv. 367.

See FRAUDULENT CONVEYANCES, 3, 6, 7, 11.

c. TO HUSBAND AND WIFE IN FEE.

62. A conveyance to husband and wife, in fee, vests the estate in them as tenants in entirety, the whole of which remains in the survivor of them, and neither, during the life of the other, is able to affect it to the prejudice of the other. *Gibson v. Zimmerman*, xii. 385.

d. IN TRUST TO HER SEPARATE USE.

63. Where personal property is given to the separate use of the wife, and no trustee appointed, the husband is the trustee of the wife. To authorize a court of equity in such case to appoint a trustee, it must appear that the husband is insolvent, or that the property cannot be compensated in damages. *Freeman v. Freeman*, ix. 763.

64. In creating a trust to the sole use of a married woman, no particular form of words is necessary. Words clearly manifesting such an intention on the part of the grantor, will bar the husband's marital rights. *Clark v. Maguire*, xvi. 302. *Clark v. Conway*, xxiii. 438.

65. A. conveyed to B. one-half of the capital stock and property used in a certain business, "in trust for the sole benefit of the wife of C., and her children;" also, one-half of the profits arising from the business "to be applied by B. for the benefit of C.'s wife and her children"—*Held*, that this language is sufficient to exclude C.'s marital right to the profits of said business. *Clark v. Maguire*, xvi. 302. *Clark v. Conway*, xxiii. 438.

66. Where a trust is created for a married woman's separate use without more, she has an alienable estate independent of her husband, which she may dispose of as a *femme sole* owner; she has also power, incident to property in general, of contracting debts to be paid out of her separate estate. *Whitesides v. Cannon*, xxiii. 457. *Segond v. Garland*, xxiii. 547.

67. A deed of gift provided that "in consideration of the natural love and affection that I entertain and feel for my daughter, Susan M. Kerr, and in consideration of the more surely providing for her and her children a permanent property, I do hereby grant and bestow, of my free gratuity, and for and in consideration as above expressed, to my said daughter Susan, and to heirs, separately and exclusively from all claim and interest of her husband, John K. Kerr, my negroes, &c. I do hereby, for the consideration and to the end aforesaid, convey said negroes to Francis P. Peneston, in trust to hold the same for the sole and exclusive use and benefit of my daughter, Susan M. Kerr, and to her heirs forever," &c.—*Held*, that the legal ownership of such slaves vested in Peneston, and that he held for the benefit of Mrs. Kerr, to the exclusion of her husband. *Blue v. Peneston*, xxiv. 240.

E. OF HER ESTATE AND THE HUSBAND'S INTEREST THEREIN.

68. An agreement between the husband (his wife not joined in it,) and other heirs to an estate, to bring all advances into *hotchpot*, will not divest the wife of her estate in the land. *Chouteau v. Paul*, iii. 260.

69. The husband and wife, under the statute of 1825, (R. S. 1825, 220, § 12,) could not convey an estate granted to the wife and her heirs during coverture. *Hedelston v. Field*, iii. 94. (But see R. S. 1855, 362, § 35.)

70. A conveyance by husband and wife of land held in her right, made after the introduction of the common law in 1816, (See 1 Ter. L. 436,) and before the act of 1821, expressly authorizing such conveyances (See 1 Ter. L. 756,) was valid, both by the Spanish law, which the adoption of the common law did not repeal, and by the common law itself. *Lindell v. McNair*, iv. 380. [Explained and limited by *Reaume v. Chambers*, xxii. 36.]

71. A deed purporting to convey the real estate of the wife, in which the husband only joins as a party assenting to the conveyance by his wife, will not convey the interest of the husband in such real estate. *Ellenmann v. Thompson*, x. 587.

72. A deed of bargain and sale executed by husband and wife on the 4th Nov., 1816, purporting to convey the wife's real estate, the wife being at that date an infant, may be avoided by their joint deed executed to another person on 5th February, 1846. *Youse v. Norcoms*, xii. 549. *Norcum v. Gaty*, xix. 65. *Norcum v. Sheahan*, xxi. 25.

73. The act of 1849, (Acts 1848-9, 67,) exempting certain property of married women from the debts of their husbands, does not disable the wife from voluntarily joining in a conveyance of her real estate to secure a debt of her husband. *Schneider v. Staihr*, xx. 269.

74. A wife may, when she becomes discovert, affirm and ratify a deed made by her during coverture. *Boatman v. Curry*, xxv. 433.

75. By the law of Kentucky in 1830, a married woman had full power to dispose of personal property vested in her for her sole and separate use, and the joinder of her husband, in a deed of transfer, did not affect its validity. *Sallee v. Chandler*, xxvi. 124.

f. ACKNOWLEDGMENT OF DEED BY WIFE.

aa. *When conveying her estate.*

76. Where the certificate of acknowledgment of a deed executed by husband and wife, to convey lands of the wife, states that the wife, upon "separate examination, acknowledged and declared that she executed the deed and relinquished her dower in the lands mentioned in the deed," the deed, thus acknowledged, will not pass the fee simple estate of the wife. *McDaniel v. Priest*, xii. 544. See *INFRA*, 80.

77. In 1821, the acknowledgment of a deed of a husband and wife by the wife, she being a grantor, was sufficient to entitle it to be recorded, the only object of the record at the time being notice to the world of the existence of the deed. *Meyer v. Campbell*, xii. 603.

78. A certificate of a wife's acknowledgment must comply substantially with the requirements of the statute; and, if defective, it cannot be aided by a court of equity, nor by parol proof. *Chauvin v. Wagner*, xviii. 531.

79. A certificate of a wife's acknowledgment, under the statute of 1825, (R. S. 1825, 220, § 12,) of a conveyance of her own estate, is not vitiated by an omission to state that the contents were explained to her, if it is stated that she was "acquainted with the contents." *Ibid.* *Thomas v. Meier*, xviii. 573.

80. If a certificate states that the wife "was examined, whether she acknowledged that she executed the deed and relinquished her dower," and that "she acknowledged that she executed the deed and relinquished her dower," it will pass her estate, if otherwise sufficient. *RYLAND, J., dis.* *Chauvin v. Wagner*, xviii. 531. *Perkins v. Carter*, xx. 465. *Chauvin v. Lowmes*, xxiii. 223. See *SUPRA*, 76.

81. Under the statute of 1825, (R. S. 1825, 220, § 12,) the omission of the words, "and does not wish to retract," in a certificate of a married woman's acknowledgment of a conveyance of her own estate, is fatal. *Per GAMBLE, J. SCOTT, J., dis.* and *RYLAND, J.*, expressing no opinion. *Chauvin v. Wagner*, xviii. 531. *Chauvin v. Lowmes*, xxiii. 223.

82. The insertion of the words, "relinquished her dower in the premises," or the like, in a certificate of the acknowledgment of a deed by a wife conveying her own estate, does not render the deed void as to her. *Delassus v. Foston*, xix. 425.

83. A deed executed Nov. 16, 1819, in Illinois, by husband and wife, and acknowledged before a notary public there, is ineffectual to convey the wife's real estate in Missouri. *Reaume v. Chambers*, xxii. 36.

bb. *On Relinquishment of Dower.*

84. A certificate of acknowledgment of a married woman which states that, "she acknowledges that she executed the deed freely," but omits to state that she "relinquished her dower," is insufficient to pass dower. *Thomas v. Meier*, xviii. 573.

85. A release of dower under the statute of 1835, (R. S. 1835, 122, §§ 23, 24,) required an examination of the wife, apart from her husband, and that the certificate should state the fact of such examination. *Rogers v. Woody*, xxiii. 548.

g. SURVIVORSHIP.

86. A married woman had a reversionary interest in a chattel, expectant on the death of the tenant, for life. The husband and wife assigned it for value. The husband died before the death of the tenant for life—*Held*, that the assignment did not defeat the wife's right of survivorship, since it did not operate as a constructive reduction into possession by the husband. *Wood v. Simmons*, xx. 363.

87. A. conveyed certain premises, reserving to himself "the use of said tract of land, and farm thereon, or the rents and profits arising from it during his life, and the life of his wife"—*Held*, that this reservation created no interest in the wife, and that she was not entitled to the rents and profits after her husband's death. *Logan v. Caldwell*, xxiii. 372.

X. COMMUNITY PROPERTY UNDER THE FRENCH AND SPANISH LAW.

88. Where a husband, residing in Louisiana with his wife, used money belonging to the community, in the purchase of lands in Missouri, and took the title in his own name, and was subsequently divorced—*Held*, that the land in this State will be considered in equity, as held by the husband in trust for the wife, to the extent of her interest in the money invested in its purchase, there being no evidence of any assent on her part to a change in the property by the investment, and it makes no difference that the parties were temporarily residing in Missouri at the time of the investment. *Depas v. Mayo*, xi. 314. And see *Pensenneau v. Pensenneau*, xxii. 27.

89. By the custom of Paris, or the French law, only the personal estate of the parties entered into the community or partnership which the law established between husband and wife upon marriage. But the Spanish law included in the community both the real and personal estate. *Childress v. Cutter*, xvi. 24.

90. By the Spanish law, which formerly prevailed here, property which the husband and wife owned in community, might, while the community existed, be

conveyed by the husband without the wife's consent; and the introduction of the common law, and of laws prescribing the mode in which a married woman might convey her separate property, did not abrogate this right of the husband to dispose of the community property. *Moreau v. Delchemendy*, xviii. 522.

91. A royal gift or grant to the husband or the wife did not accrue to the community under the custom of Paris or the Spanish law. Nor did concessions in Louisiana, unless when made on a consideration which was a burden on the community. *Wilkinson v. American Iron Mountain Co.*, xx. 122.

See SUPRA, 21-25; . . . PUBLIC LANDS, 124.

XI. ACTION BY AND AGAINST HUSBAND AND WIFE.

a. GENERALLY.

92. A judgment, by confession, against husband and wife, for the sole debt of the wife, under the letter of attorney executed by them jointly for that purpose, is a valid judgment. *Benjamin v. Bartlett*, iii. 86.

93. There is a distinction between cases where a suit affects a wife's interest in real estate, which is claimed in her own right, and cases in which she has only an inchoate right of dower. In the former class of cases the wife is a necessary party to the proceedings, in order to divest her right, but in the latter class the husband alone is the proper party to defend a proceeding instituted to divest the title to land, to which a mere inchoate right of dower has attached. *Riddick v. Walsh*, xv. 519.

94. In an action of attachment against the husband, the wife cannot appear and file her interpleader at law. Her claim to the property attached must be asserted in a court of chancery. *Withers v. Shropshire*, xv. 631.

95. Although in a suit in behalf of persons claiming to be husband and wife, it is competent for them to prove the marriage by evidence of cohabitation and by general reputation, yet the defendant may show that the alleged marriage is illegal and void. *Boatman v. Curry*, xxv. 433.

b. BY THE WIFE ALONE.

96. A *femme covert* may enforce her rights by an action in her own name, without joining her husband, where she lives separate and apart from him, under articles of separation, and her husband resides out of the State. *Rose v. Bates*, xii. 30.

See EJECTMENT, 21, 22; . . . REPLEVIN, 18, 19.

XII. MARITAL RIGHTS DETERMINED BY WHAT LAW.

97. The law existing at the time of the dissolution of a marriage by death, determines the marital rights of the parties, in cases where the marriage was celebrated abroad, as well as in those cases where celebrated here. *Riddick v. Walsh*, xv. 519.

XIII. ARTICLES OF SEPARATION.

98. Articles of separation executed December 24, 1803, which purported to dissolve the marriage relation of the parties thereto, and by which they agreed to live separate and apart from each other, they dividing the property owned by them in community, renouncing mutually all rights and powers flowing from their matrimonial contract, and granting to each other the free and absolute disposition and control of their property and conduct, as if they had never been married, are null and void by both the Spanish law and the common law, and do not deprive the husband of his curtesy in property conveyed directly to the wife, without the intervention of trustees, to her separate use after such separation. *Gonsolis v. Douchouquette*, i. 666. *Chouteau v. Douchouquette*, i. 669.

See SUPRA, 96; . . . INFRA, 117.

XIV. DIVORCE AND ALIMONY.

a. CAUSES OF DIVORCE.

aa. *Adultery.*

99. Adultery committed in England, where the parties resided, and of which the innocent party was cognizant there, and took no steps there to obtain a divorce, will not be investigated here. *Stokes v. Stokes*, i. 320.

See INFRA, 111, 115.

bb. *Absence for Two Years.*

100. A petition for divorce, on the ground of the absence of the defendant for more than two years, must allege that the absence was without reasonable cause. *Freeland v. Freeland*, xix. 354.

cc. *Personal Indignities.*

101. Charges of infidelity are not such personal indignities as constitute a ground of divorce, under the statute, (R. S. 1845, 426, § 1.) Mere indignities to the moral character or reputation are insufficient. Such indignities must be, in some way, connected with the person of the party in order to come within the statute. [OVERRULING *Lewis v. Lewis*, v. 278.] *Cheatham v. Cheatham*, x. 296.

102. But under the act of 1849, (Acts 1848-9, 49, § 1,) it is not necessary that indignities should be offered to the person, to be the ground of divorce. *Hooper v. Hooper*, xix. 355. [And see R. S. 1855, 662, § 1.]

103. The petition must set out the facts constituting the indignities. *Ibid.* *Bowers v. Bowers*, xix. 351.

104. And to support a decree for a divorce, on a petition alleging indignities offered to the petitioner, the finding must state the nature of the acts and abuse, not merely that the acts and abuse were indignities. *Bowers v. Bowers*, xix. 351.

105. Where a husband wrote to his wife, stating his determination never again to live with her; that she did not suit him; that he had been deceived in her, and that her conduct towards his relatives had been improper—*Held*, that this was not an indignity sufficient to warrant a decree of divorce under the act of 1849. *Hooper v. Hooper*, xix. 355.

106. Nor is a notice to all persons, posted by the husband, not to credit his wife. *Ibid*.

dd. *Cruel and Barbarous Treatment.*

107. Where a divorce is sought on the ground of cruel and barbarous treatment, the inquiry should embrace the conduct of the parties toward each other during the period of the alleged misconduct; proof of particular acts of cruelty, especially where the divorce is sought by the husband, will not generally be sufficient to authorize a judgment of divorce. If the alleged cruel treatment be the result of the husband's misconduct, he cannot have the redress sought. *Doyle v. Doyle*, xxvi. 545.

ee. *Condonation.*

108. After such wrong has been committed as would warrant a divorce, if the parties voluntarily cohabit with each other, it is a condonation of the offense. *Twyman v. Twyman*, xxvii. 383.

b. JOINDER OF CAUSES OF DIVORCE.

109. Different causes of divorce may be joined in the same bill. *Stokes v. Stokes*, i. 320.

c. REQUISITES OF THE BILL OR PETITION.

110. The cause for divorce ought to be specifically alleged in the bill, and not left to inference or presumption. *Ibid*.

d. CROSS BILL.

111. In a suit for a divorce by the husband against his wife, on the ground of habitual drunkenness for more than two years, the wife may recriminate, that the husband has been guilty of adultery, and the proof of such charge will prevent the granting of a divorce. *Ryan v. Ryan*, ix. 535.

e. RESIDENCE OF COMPLAINANT.

112. One year's residence was not, under the act of 1807, (1 Ter. L. 92, § 5,) necessary, previous to an application for a divorce *a mensa et thoro*; it was only necessary where the application was for a divorce *a vinculo matrimonii*. *Stokes v. Stokes*, i. 320.

113. A bill for divorce should show either that the complainant has resided within the State one whole year next preceding the application, or that the offense complained of was committed within this State, or while one or both of the parties resided within the State. (R. S. 1845, 427, § 4.) *Cheatham v. Cheatham*, x. 296.

114. The complainant, in an action for divorce, must be a resident of this State. *Kruse v. Kruse*, xxv. 68.

f. EVIDENCE.

115. Upon a petition for divorce, brought by a husband against his wife, charging her with adultery, evidence of her general good character is admissible. *O'Bryan v. O'Bryan*, xiii. 16.

116. The admissions of a party are evidence against him, but alone they are not sufficient to warrant a decree of divorce; they must be supported by other evidence. *Twyman v. Twyman*, xxvii. 383.

g. BAR TO THE ACTION.

117. A deed of separation is no bar to an application on the part of the wife for a divorce. *Stokes v. Stokes*, i. 320.

h. EFFECT OF DIVORCE.

118. A decree of divorce operates so as to place the wife in the situation she would have occupied had her husband died. *Wood v. Simmons*, xx. 363.

i. GUILT OF BOTH PARTIES.

119. Upon an application for a divorce, where both parties are found guilty of any of the enumerated offenses for which a divorce may be granted, the bill will be dismissed. *Nagel v. Nagel*, xii. 53. *Duncan v. Duncan*, xii. 157.

j. SETTING ASIDE DECREE OF DIVORCE.

120. The provision of the statute, (R. S. 1845, 851, §§ 1-4,) that a decree rendered against a party who has not been summoned and has not appeared, may be set aside within a time limited, applies to a decree of divorce. *Scott, J., dis. Smith v. Smith*, xx. 166.

121. Under the revised statutes of 1845, a decree of divorce obtained by fraud, might be set aside upon a petition for a review. *Munsfield v. Munsfield*, xxvi. 163.

122. The statute (R. S. 1855, 666, § 14,) is applicable only to suits for divorce commenced after May 1, 1856. *Ibid.*

123. The fact that a decree of divorce was rendered in behalf of the plaintiff upon a finding of facts, which omitted to state that the plaintiff was an innocent and injured party, both parties appearing to the suit, does not render the decree invalid. (R. S. 1855, 665, § 10.) *Schmidt v. Schmidt*, xxvi. 235.

k. ALIMONY AND MAINTENANCE.

124. Wanton abandonment by the husband, and destitution of the wife, is good ground for a decree of maintenance of the wife, under the act of 1845, (R. S. 1845, 428, § 9.) *Hooper v. Hooper*, xix. 355.

125. The court may award alimony, payable in quarterly instalments, and may authorize the clerk, on a failure to pay any one of such instalments, to issue execution therefor. *Schmidt v. Schmidt*, xxvi. 235.

126. An allowance of alimony may be made, although no evidence was given showing the income of the husband. *Schmidt v. Schmidt*, xxvi. 235.

127. The separation of a husband from his wife during the pendency of a suit by him for a divorce, does not constitute an abandonment within the meaning of the statute, (R. S. 1845, 428, § 9,)—such a separation, the husband failing to obtain a divorce, would not authorize a decree of alimony. *Doyle v. Doyle*, xxvi. 545.

128. Except by virtue of statutory provisions, the courts can decree alimony only as an incident to a judgment of divorce. *Ibid.*

See LAWS, 65 ; . . . PUBLIC LANDS, 123-125 ; . . . REPLEVIN, 7.

INCLOSURES.

1. One cannot justify the killing of his neighbor's stock, under the statute, (R. S. 1845, 575,) without showing himself exactly within the protection of the statute. *Early v. Fleming*, xvi. 154.

2. Where a buffalo bull, a wild, vicious and mischievous animal, breaks into a close, the owner of such close may kill him, if this be necessary to preserve his property from destruction, although the close may not be fenced in the manner required by the statute. (R. S. 1845, 575.) *Canefox v. Crenshaw*, xxiv. 199.

3. Where one of two adjoining proprietors grants permission to the other to join fences with him, the fence of each being upon his own land, the license thus granted is a personal privilege, and is revocable; a sale of his land by such proprietor amounts to a revocation of the license. *Houx v. Seat*, xxvi. 178.

4. And a purchaser who takes without notice of an agreement to join fences will not be bound thereby. *Ibid.*

See WOODS, MARSHES AND PRAIRIES, 1.

INDIANS.

1. There was no legal authority for reducing Indians to slavery in the territory of Louisiana, while it was subject to the rule and jurisdiction of France. WASH, J., *dis.* *Marguerite v. Chouteau*, iii. 540. [OVERRULES *Same case*, ii. 59, where the decision was by a divided court, only two judges sitting.]

2. An indictment under the act of 1839, (Acts 1838-9, 66,) for trading with Indians, must aver that the Indians had not a written permit from their proper agent. *The State v. Black*, ix. 681.

I N F A N T S .

I. CONTRACT.

II. CONVEYANCES.

III. SUITS BY AND AGAINST INFANTS.

I. CONTRACT.

1. Where an infant adopts a contract, made in his behalf without authority, no one but the infant can avoid it, and a joinder, by guardian, in a suit which recognizes such contract, is an adoption of it. *Ward v. St. Bt. Little Red*, viii. 358.

2. An infant may release a debt due to him, and it cannot be objected to by a third person. *Horine v. Horine*, xi. 649.

3. Infancy is a good defense to an action for the breach of a contract to work in California, in consideration of an outfit furnished, although there has been no offer to return the outfit. *Craighead v. Wells*, xxi. 404.

4. If a minor contract to do certain work, he may avoid such contract and recover a reasonable compensation for the work done, the damage resulting from the avoiding of the contract being taken into consideration. *Lowe v. Sinklear*, xxvii. 308.

II. CONVEYANCES.

5. Mere declarations, or a promise upon some contingency to make a deed of affirmance, will not affirm the deed of an infant. *Clamorgan v. Lane*, ix. 442.

6. Sales of real estate by infants, like other contracts, are voidable only, the privilege of avoiding them being confined to the infant, his personal representatives and his privies in blood. *Ferguson v. Bell*, xvii. 347.

7. To render a subsequent conveyance an act of dissent to the prior conveyance of an infant, it must be inconsistent therewith, so that both cannot properly stand together. Thus, where an infant, as heir of her father, conveyed her interest in land, and afterwards acquired another interest in the same land by inheritance from a brother, a subsequent conveyance by herself and husband, conveying "all their right, title and interest" in the premises in question, did not avoid the prior deed. *Leitensdorfer v. Hempstead*, xviii. 269.

8. Though an infant is authorized to exercise the power of appointment, by the instrument creating the power, yet he cannot exercise it if coupled with an interest. *Thompson v. Lyon*, xx. 155.

9. Where an infant, being authorized so to do, exercises the power of appointment by conveying land, a court of equity will not interfere against a purchaser for a valuable consideration. *Ibid.*

10. A married woman, a minor, joining in a mortgage of her real estate, may, in a suit to foreclose, plead infancy during minority. *Schneider v. Staihr*, xx. 269.

11. Where a minor executes a deed of land, and, after attaining his majority, conveys the same land to a third person, the second deed is a disaffirmance of the first. This is a question of law for the court. *Peterson v. Laik*, xxiv. 541.

See ADMINISTRATION, 65; . . . HUSBAND AND WIFE, 72; . . . LANDLORD AND TENANT, 9.

III. SUITS BY AND AGAINST INFANTS.

12. An administrator may set up the infancy of his intestate at the time of the execution of the bond sued on as a bar thereto. *Parsons v. Hill*, viii. 135.

13. Where a decree has been rendered against infants, proceedings by them on coming of age, to set it aside, can only be had on notice to the other parties. *Ruby v. Strother*, xi. 417.

14. Where a judgment is rendered against an infant defendant who appears by attorney, he may, at any time after he arrives at full age, cause the same to be set aside on motion. *Powell v. Gott*, xiii. 458.

15. As, also, where rendered against infant plaintiffs who appear by attorney, although at the date of the judgment one of them had attained his majority. *Randalls v. Wilson*, xxiv. 76.

16. That a day must be given to an infant, after he comes of age, to appear and show cause against a decree in chancery, has the sanction of high authority; but it is not admitted that the rule prevails in our practice. *Per GAMBLE, J. Heath v. Ashley*, xv. 393.

17. A decree in chancery against an infant, for want of answer and without proof of the statements of the bill, is erroneous. *Ibid*.

18. A decree against infants who have not been served with process, is erroneous; they are not before the court, and the appointment of a guardian *ad litem* by the court, in such a case, is erroneous, and does not cure the defect of service. *Hendricks v. McLean*, xviii. 32.

19. It is not error that a decree in chancery against infants gives no day for them to show cause after they become of age. [*Ruby v. Strother* xi. 417 commented upon and disavowed.] *Hendricks v. McLean*, xviii. 32. *Creath v. Smith*, xx. 113. *Scott, J., dis.*, and refers to his opinion in xi. 417.

20. A. B., in the presence of his niece, a young lady living with her mother and attending school, requested the plaintiff to furnish goods to her and charge the same to him. Goods were so furnished to the niece at various times from May to December; but in September A. B. countermanded the order, which revocation was not communicated to her—*Held*, that the niece could not be held personally liable for goods purchased after the order was countermanded. *Brent v. Cobb*, xxvi. 196.

21. Infants cannot appear by attorney, but they may by guardian. *Thornton v. Thornton*, xxvii. 302.

22. A child, allowed by his father to leave home and to work and shift for himself, may maintain an action to recover the value of his services. *Ream v. Watkins*, xxvii. 516. See SUPRA, 4.

See FREEDOM 10; . . . PARTITION, 10; . . . PRACTICE, 6.

INSOLVENTS.

1. There is no distinction, in principle, between a suit prosecuted by an insolvent after his discharge, under the statute of this State, (1 Ter. L. 745,) and by a bankrupt under the English statutes. Both statutes vest the interest in the property in the trustees and assignees. But it is well settled that if a bankrupt commences a suit prior to his bankruptcy, it shall go on in his name afterwards. Therefore, a plea *puis darrein continuance*, that the plaintiff has become an insolvent debtor, is bad, on demurrer, either as a plea in bar or abatement. *Tanner v. Roberts*, i. 416.

2. Where a debtor obtains a final discharge under the statute, (R. S. 1825, 445,) and at a subsequent term allegations of fraud are filed against him, he is entitled to a continuance as a matter of course. *Jones v. Talbot*, iv. 279.

3. *It seems*, that a debtor, in contemplation of taking the benefit of the act, may give a preference to some of his creditors, and that such preference is not, therefore, undue or fraudulent. *Ibid.*

4. The evidence was that the applicant for the benefit of the act for the relief of insolvent debtors, shortly before his application, conveyed to his brother property worth five thousand dollars to secure a sum less than three thousand, with a provision that it should not be sold under two years—*Held*, that this was sufficient to justify the jury in finding a verdict against the applicant. *Talbot v. Jones*, v. 217.

5. In proceedings under § 17 of the act for the relief of insolvent debtors, (R. S. 1825, 450,) the allegation was "that the defendant had disposed of all his property to his near relations, and in particular to W. J. T., in trust for the benefit of such relations," &c.—*Held*, that it was erroneous for the court to instruct the jury, on the trial of an issue under such allegation, "that if the defendant conveyed any of his property to any of his relations with intent to take the insolvent oath, they must find for the plaintiff." The instruction should have been limited to the particular conveyance to W. J. T. *Talbot v. Jones*, v. 217.

6. A certificate of discharge under the insolvent laws of a State will not discharge the insolvent from a contract made with a citizen of another State. *Fareira v. Keevil*, xviii. 186. See *Ogden v. Saunders*, 12 *Wheat*. 213.

See ADMINISTRATION, XXII; . . . BILLS EXCHANGE AND PROM. NOTES, 104;
. . . BONDS, NOTES AND ACCOUNTS, 59-63; . . . FRAUDULENT CON-
VEYANCES, III.

INSURANCE.

I. POLICY—ITS CONSTRUCTION AND THE PERILS INSURED AGAINST.

II. REPRESENTATIONS AND CONCEALMENT—AND HEREIN OF INCUMBRANCES.

III. ASSIGNMENT OF POLICY.

IV. LOSS.

- a. GENERALLY.
- b. TOTAL LOSS.
- c. GENERAL AVERAGE.
- d. NOTICE OF LOSS.
- e. PROOF OF LOSS.
- f. DELIVERY AND ACCEPTANCE.
- g. INSURER'S LIABILITY FOR EXPENSES.

V. DEVIATION.

VI. ABANDONMENT.

VII. PREMIUM AND PREMIUM NOTES.

VIII. ACTION ON POLICY.

IX. CHANGE OF OWNERSHIP AND NOTICE THEREOF.

X. LIFE INSURANCE.

I. POLICY—ITS CONSTRUCTION AND THE PERILS INSURED AGAINST.

1. A policy of insurance contained this stipulation: "indorsements on this policy to be the evidence of property at the risk of the company under the same"—*Held*, that the insured could recover only when the indorsements were made prior to the loss. *Edwards v. Perpetual Ins. Co.*, vii. 382.

2. In a river policy of insurance on a steamboat against the perils of the river, "it was also agreed that the assurers are not to be liable for any partial loss, or particular average, unless such loss or average should amount to ten per cent. on the value of said boat or vessel; nor should they be held liable for the bursting of boilers, or breaking of engines, unless occasioned by external violence." The boat was destroyed by the bursting of the boiler—*Held*, that the bursting of the boiler was within the perils of the river; that the exception in the policy as to the liability for bursting of boilers or breaking of engines, to such as are caused by external violence, applies only to cases of partial, and not to cases of total loss, and that the external violence intended by the policy is violence external to the boat, and not merely external to the boiler. *Citizens' Ins. Co. v. Glasgow*, ix. 406.

3. And in estimating the loss in such case, the value of the engines and boilers is not to be taken into consideration. *Ibid*.

4. An insurance declared to be "upon the freight bill" of a steamboat, is an insurance that the boat shall earn freight; and the insurer is responsible if the boat fail to do so in consequence of an accident to the boat, as well as by any damage to the cargo. *Field v. Citizens' Ins. Co.*, xi. 50.

5. And where such a policy was executed, and the boat was injured in the hull so as to lose the voyage, by abandoning the freight bill, she would recover on the policy. *Ibid*.

6. But an agreement, after the accident by which the boat had lost the voyage, "that the insurers will consider themselves bound by the policies of insu-

rance on cargo and freight bill, by a transfer of same" to another boat, exempts the insurers from liability to the first boat. *NAPTON, J., dis. Ibid.*

7. In a fire policy, containing the following proviso, viz.: "Provided, always, and it is hereby declared that this company shall not be liable to make good any loss by theft, or any loss or damage by fire, which may happen, or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power," the clause exempting the company from liability for losses by theft, is independent of the one immediately following, and protects the insurer against losses by larceny, however they may happen. *Webb v. Protection and Aetna Ins. Co., xiv. 3.*

8. Several shipments of horses and negroes were indorsed upon the policy, one of which had a memorandum attached to it in these words: "the horses and negroes entered above, are only insured against the dangers incident to navigation, drowning, blowing up, &c."—*Held*, that the policy covered the loss of a negro by drowning during the voyage, whether it happened by an ordinary or extraordinary cause. *Moore v. Perpetual Ins. Co., xvi. 98.*

9. The printed part of an open policy of insurance, enumerating the risks assumed by the insurers, may be modified by an indorsement, covering other risks than those mentioned, and avoiding some that are mentioned in the printed enumeration. *Ibid.*

10. A policy of insurance contained a clause in these words: "Provided, that the insurers shall not be liable for any partial loss, except in cases of general average, unless said loss amounts to ten per cent. on the agreed value of this policy, exclusive of all expenses of ascertaining and proving the same; nor for damage or loss arising from, or caused by the said steamboat being duly unladen, during the continuance of this policy; nor for any damage or loss arising from the bursting of boilers, collapsing of flues, or breaking of engines, unless from unavoidable external cause, or from any consequences resulting therefrom"—*Held*, that there was an entire exemption from all losses, whether partial or total, arising from the bursting of boilers, except in specified cases. *Roe v. Columbus Ins. Co., xvii. 301.*

11. Under this policy, fire being one of the risks insured against, where a boiler bursted while the boat was running, which drove out the adjacent boiler, and tore away the stanchions supporting the upper deck, so that it fell down into the furnace and took fire, the bursting of the boiler was held to be the immediate and proximate cause of the loss, and therefore within the exemption of the policy. *Ibid.*

12. As to the true meaning of the words "or from any consequences resulting therefrom." *Ibid.*

13. The principles decided in the case of *Roe v. Columbus Ins. Co.*, will apply to a case in which the circumstances of loss were the same and the policy contained the following clause: "In case of partial damage over ten per centum, this company to pay in proportion as the sum insured is to the whole value of said boat; but not accountable for damages done by the bursting of a boiler or boilers, or the breaking of machinery, except when caused by external violence." *McAllister v. Tennessee Marine and Fire Ins. Co., xvii. 306.*

14. Under a policy of insurance, which grants the privilege "to reship at all times and places," if the goods which were put on board one steamboat to be carried to a certain place, were re-shipped on the way, although unnecessarily, upon another boat bound to that place, in an action on the policy, such re-shipment cannot be claimed as a deviation and avoidance of the policy, whatever might have been the result had the defendants relied upon the delay or abandonment of the voyage. *Fletcher v. St. Louis Marine Ins. Co.*, xviii. 193.

15. A policy of insurance, in which fire and ice were excepted perils, was renewed by an indorsement in these words: "it being understood that the assured is not entitled to claim for any loss or damage arising from ice"—*Held*, that a second renewal by indorsement, thus: "the within policy is renewed," &c., applies to the original policy and not to the policy as renewed by the first indorsement. A loss by fire after the second renewal is not covered by the policy. *Hornick v. Phoenix Ins. Co.*, xxii. 82.

16. Merchandise was insured on the steamboat Georgia from St. Louis to Council Bluffs. The boat was disabled, and stopped at St. Joseph for repairs, which could not be made without a resort to St. Louis, and for this a detention of twelve days would be necessary—*Held*, that this was not such a breaking of the voyage as would justify the master in transshipping the property insured to another boat, and that by such transshipment the insurers were discharged. *Salisbury v. Marine Ins. Co.*, xxiii. 553.

17. A clause in a fire-policy on merchandise, created a forfeiture in the event that any of the articles enumerated in the memorandum of special rates is kept in the house in which the merchandise was stored, except where a special provision is made in the policy. Gunpowder was included in the memorandum of special rates. By a subsequent clause, twenty-five pounds of powder were allowed to be kept, provided it is kept in tin or metallic canisters—*Held*, that the assured might keep in store twenty-five pounds of powder, in tin or metallic canisters, without vitiating his policy. *Bowman v. Pacific Ins. Co.*, xxvii. 152.

18. A condition in a policy of insurance that the assured shall cause any previous or subsequent insurance to be indorsed on the policy is a condition precedent, and is not satisfied by verbal notice to the insurer of such other insurance. *Hutchinson v. Western Ins. Co.*, xxi. 97.

II. REPRESENTATIONS AND CONCEALMENT, AND HEREIN OF INCUMBRANCES.

19. Where the validity of a policy depends on the materiality of a fact suppressed, as that the furniture insured was used in a house of ill-fame, only the natural consequences of the use to which the house was applied, are to be regarded, and acts of lawless violence are not such. In estimating such materiality, it is important to consider, that in the classification of risks in the by-laws of the company, increased premiums were not required on houses of this nature. *Loehner v. Home Mutual Ins. Co.*, xvii. 247. *Same case*, xix. 628.

20. Where a house and its furniture are insured in the same policy, which is

void by statute as to the house, on account of the failure of the assured to give notice of an incumbrance, though it did not affect the risk, the validity of the policy as to the furniture is governed by the general law of insurance. *Ibid. Ibid.*

21. A policy void as to buildings, by virtue of a statute, may be valid as to furniture therein, the illegal provisions being distinct and capable of separation, and there being no express words in the act to render the whole void. *Ibid. Ibid.*

22. Where an insurance company have adopted and made public rules respecting representations, the assured is bound to take notice of and comply with them. A representation which has been made a part of the policy becomes a warranty, and, whether material or immaterial, the matter of it must be such as it is represented, or there can be no recovery on the policy. In this case the policy was void by the charter, because the assured failed to give notice of an incumbrance on the premises insured. *Ibid. Ibid.*

23. Such an incumbrance being required by the charter to be expressed, and a memorandum being indorsed, also, on the policy, to the effect that the company would be bound by no statement made to the agent which was not contained in the application, it will not give a right of action on the policy to the plaintiffs that, at the time of the application, the agent was informed of the incumbrance, and said it was "too trifling," although it would be sufficient to avoid the policy and give a right of action for the recovery of the premium. *Ibid. Ibid.*

24. The failure of the insured to disclose the state of his title, or the extent of his interest in the property insured, where there is no fraudulent concealment or misrepresentation, will not avoid the policy. Insurance companies may protect themselves by inquiries, or by the conditions of their policies. *Morrison v. Tennessee Ins. Co.*, xviii. 262.

III. ASSIGNMENT OF POLICY.

25. The deposit of a policy of insurance with a creditor of the assured, as a security for a debt, gives such creditor a lien upon the proceeds of the policy which will be binding upon the assured, the insurer, and all who, with notice of such lien, take an interest in the policy from the assured. *Ellis v. Kreutzinger*, xxvii. 311.

26. And the clause in a policy which prohibits an assignment thereof without the written consent of the company, does not affect the rights of the creditor in such case. *Ibid.*

IV. LOSS.

a. GENERALLY.

27. Where a steamboat was insured against fire, and afterwards put on the dock for repairs, and, while on the dock, through the carelessness of the work-

men having her in charge, was burned, the insurers were held liable for the loss. *St. Louis Ins. Co. v. Glasgow*, viii. 713.

28. Where the assured stipulates in the policy that the boat shall be completely provided with "master, officers and crew," it is no breach of such stipulation that the boat was placed temporarily in the charge of workmen for the purpose of repairs. *Ibid.*

b. TOTAL LOSS.

29. A technical total loss is where the damage exceeds half the value of the thing insured. *Citizens' Ins. Co. v. Glasgow*, ix. 406.

30. Where a steamboat, whose freight list is insured against a total loss only, meets with a disaster upon the voyage, and by a peril insured against is rendered totally unable to transport the cargo, and cannot be repaired in a reasonable time to do so, this will amount to a total loss within the meaning of the policy, although a *pro rata* freight should be received for the portion of the voyage completed at the time of the disaster. *Willard v. Millers' and Man. Ins. Co.*, xxiv. 561.

See *INFRA*, 46.

c. GENERAL AVERAGE—See *SUPRA*, 2, 3, 10–13.

d. NOTICE OF LOSS.

31. Where a steamboat was insured by a river policy, and a loss occurred by the bursting of the boiler, the letter of abandonment stated, as the cause of loss, that the boat "had been nearly destroyed by the late disaster" — *Held*, that this was sufficient where the insurance company proceeded to act on the abandonment, the cause of loss being matter of public notoriety. *Citizens' Ins. Co. v. Glasgow*, ix. 406.

32. The receiving of a notice and failure to make objection to it as not in time, is no waiver of any insufficiency in the notice. *St. Louis Ins. Co. v. Kyle*, xi. 278.

33. Where, by the conditions of a policy of insurance, notice of the loss is required to be given forthwith, it is only necessary that the notice should be given with due diligence under all the circumstances of the case; and under the circumstances of this case, a notice on the fourth day after the fire was held sufficient. *Ibid.*

34. If a policy requires notice of a loss to be given "forthwith," it must be understood to mean with all due diligence. [The distinction taken in *St. Louis Ins. Co. v. Kyle*, xi. 278, between the notice of loss and the preliminary proofs questioned.] *Phillips v. Protection Ins. Co.*, xiv. 220.

e. PROOF OF LOSS.

35. Formal defects in the preliminary proof of loss required to be submitted to the insurers, are waived by the insurers pleading their refusal to pay on other grounds, and evidence of such waiver may be given under an averment of performance. *St. Louis Ins. Co. v. Kyle*, xi. 278.

36. Where the insurers in a policy refuse to pay the loss on the ground that the insured failed to appear and submit to an examination, as required by the policy, in relation to the loss, they cannot afterwards object to his failure to comply with other requisitions of the policy as to the mode of proof. *Phillips v. Protection Ins. Co.*, xiv. 220.

37. Where a policy requires the insured, in case of loss, to appear with vouchers and submit to examination and oath, if required by the agent of the insurers, a failure so to appear may be excused by showing that he was necessarily engaged in saving his family from an epidemic. *Ibid.*

38. Where there was, in a policy of insurance, the provision that in case of loss the insured should obtain a certificate or other instrument from the nearest magistrate, that all was fair and without fraud, the compliance with this provision is a condition precedent to a recovery for the loss. The certificate must be from the nearest magistrate. And where an insufficient certificate was obtained, but not at once objected to, and the company entered into negotiation for the purpose of ascertaining and settling the amount for which they were liable—*Held*, that the company had not waived their rights as to the certificate. *Noonan v. Hartford Fire Ins. Co.*, xxi. 81.

f. DELIVERY AND ACCEPTANCE.

39. Where goods shipped were covered by a policy of insurance, and, after a part had been landed, all of them were burned, as well those on the levee as on the boat, the insurance company will not be exonerated from the loss on those which had been landed, unless they had been received or accepted by the consignee, or unless a reasonable time had elapsed for the discharge of the remainder. *Fletcher v. St. Louis Marine Ins. Co.*, xviii. 193.

40. The question of delivery and acceptance, in this case, is for the jury. *Ibid*

g. INSURER'S LIABILITY FOR EXPENSES.

41. A policy of insurance upon a steamboat contained the usual clause making it the duty of the assured, in case of loss or misfortune, to use every practicable effort for the safeguard and recovery of the steamboat—*Held*, that where, by the grounding of the boat, it was in immediate danger of being lost or seriously damaged unless launched or set afloat, the insurer was liable for reasonable expenses, incurred in good faith, in launching and setting the boat afloat. *Dix v. Union Ins. Co.*, xxiii. 57.

V. DEVIATION.

42. A departure from the usual course of a voyage for the purpose of saving the property of another boat in distress, is a deviation which discharges the insurer. *Settle v. Perpetual Ins. Co.*, vii. 379.

43. But it may be shown, in justification of such departure, that it was in accordance with the custom and usage of boats in such cases in the navigation of the Mississippi river. *Walsh v. Homer*, x. 6.

44. And what constitutes a deviation depends upon the nature of the voyage and the usage of the trade. *Walsh v. Homer*, x. 6. See SUPRA, 14.

VI. ABANDONMENT.

45. If the owner of property insured, upon being notified of its loss, abandons it to the underwriters, and notifies them thereof, the underwriters become the owners of the property from the time of the abandonment, whether they accept it or not, provided the loss happens from one of the perils insured against. *Gould v. Citizens' Ins. Co.*, xiii. 524.

46. In case of an insurance on freight "against a total loss only," to authorize an abandonment the loss must be an actual total loss, and not a constructive or technical total loss. *Willard v. Millers' and Man. Ins. Co.*, xxiv. 561.

VII. PREMIUM AND PREMIUM NOTES.

47. The insolvency of an insurance company, at the time of issuing a policy, does not render the contract void or exempt the assured from the payment of the premium, unless actual fraud was practised on him. *Clark v. Middleton*, xix. 53.

48. It is a good defense to an action on a premium note that the maker was induced to give it by false representations of the solvency of the company, made with intent to deceive; nor is it necessary that the false representations should be made to the maker of the note personally; any false and fraudulent representations, as by the statement required to be filed in the clerk's office by a foreign company, and which were relied on by the maker, are sufficient. *City Bank of Columbus*, v. *Phillips*, xxii. 85.

VIII. ACTION ON POLICY.

49. Where the assured agrees that the boat upon which the insurance is effected shall be completely provided with "master, officers and crew," it is not necessary, in an action on the policy, to avow that the boat was so provided. *St. Louis Ins. Co. v. Glasgow*, viii. 713.

50. Where, by the terms of a policy, losses are to be paid in sixty days after they occur, and proof thereof is filed in the office of the insurers, if the insurers refuse to adjust the loss, an action will lie within the sixty days. *Phillips v. Protection Ins. Co.*, xiv. 220.

51. An insurance company which has paid a loss on a policy, through ignorance of the fact that it had become void, may recover it back. *Columbus Ins. Co. v. Walsh*, xviii. 229.

52. And the defendant cannot resist re-payment of the money on the ground that he effected the insurance as agent of the real owner, if such agency was not disclosed before payment. *Ibid.*

53. The fact that an agency of a foreign insurance company has not complied

with the requirements of the statute relating to foreign insurance companies, will not prevent the company from maintaining or defending a suit, for the statute does not avoid the policy in such a case. *Ibid.* *Clark v. Middleton*, xix. 53.

54. If insurance is made by one in his own name, without any indication in the policy that another is interested, an action cannot be maintained in behalf of that other party, being the owner of the goods so insured. Parol evidence cannot be introduced to show that the parties understood the effect of the policy to be otherwise by reason of certain words it contained. *Wise v. St. Louis Marine Ins. Co.*, xxiii. 80. See INTEREST, 13.

IX. CHANGE OF OWNERSHIP AND NOTICE THEREOF.

55. In a policy upon a steamboat, providing for notice to the insurers of a change of master or owners, it is necessary for their assigns to give like notice of every subsequent change. *Tennessee Ins. Co. v. Scott*, xiv. 46. *Eddy v. Tennessee Ins. Co.*, xxi. 587.

56. A policy of insurance, effected by partners on their stock in trade, contained this clause: "and in case of any transfer or change of title in the property insured by this company, such insurance shall be void and cease"—*Held*, that a dissolution of the partnership, and a division of the partnership property prior to the fire, destroyed all right to recover on the policy. *Dreher v. Aetna Ins. Co.*, xviii. 128.

57. An absolute assignment or sale of insured property after insurance is effected, takes away the insurable interest of the vendor, and creates a bar to the right of action on the policy, unless by some means its existence has been preserved for the benefit of the assignee. *Morrison v. Tennessee Ins. Co.*, xviii. 262.

58. Thus, where A. effected an insurance on property, and afterwards sold and conveyed it to B., who reconveyed it to a trustee to secure to A. the payment of the purchase money—*Held*, that A. retained an insurable interest, and, after a loss, might recover on the policy to the extent of his actual loss, not to exceed the sum insured. *Ibid.*

59. And the right of a surety to be subrogated to the securities of his principal, does not arise until he has paid the principal's debt. Thus the insurance company in this case could not be subrogated to A.'s rights against B., until it had paid the insurance, if at all. *Ibid.*

X. LIFE INSURANCE.

60. A policy of life insurance contained a clause by which it was avoided if the assured should die in the known violation of a law of the State—*Held*, that under this clause the policy would not be avoided if the assured was killed in an altercation, under circumstances which would make the slayer guilty of manslaughter. To avoid the policy, the killing must have been justifiable or excusable homicide. *Harper v. Phoenix Ins. Co.*, xviii. 109.—*Held*, also, that this clause should be construed to extend only to instances in which the party died in the commission of a felony. *Same case*, xix. 506.

See LOCAL DECISIONS, IX, X.

INTEREST.

I. HOW COMPUTED.

- a. IN CASES OF PARTIAL PAYMENTS.
- b. WHEN PAYABLE ANNUALLY.

II. BY WHAT LAW REGULATED.

III. INTEREST UPON INTEREST.

IV. PROCEEDINGS TO RECOVER.

V. INTEREST IN SPECIAL CASES.

- a. GARNISHMENT.
- b. FAILURE OF TITLE.
- c. CERTIFICATE OF DEPOSIT.
- d. COUNTY WARRANT.
- e. AGENCY.
- f. INNKEEPER.
- g. INSURANCE.
- h. PENAL BOND.
- i. ADMINISTRATION.
- j. ON LOST BOND.
- k. UNLIQUIDATED ACCOUNTS.
- l. BONDS AND NOTES.

I. HOW COMPUTED.

a. IN CASE OF PARTIAL PAYMENTS.

1. Interest is to be computed on a demand up to the first partial payment, then add the interest to the principal and deduct the payment therefrom, then cast interest on the remainder to the second payment, add the interest to the remainder, and deduct therefrom the second payment, and so on until the last partial payment, unless, in any case, the interest up to any payment shall exceed the payment, in which case such payment is to be deducted from the interest, and the excess of the interest is to be carried forward, without casting interest thereon, to the next payment that will discharge the excess. *Riney v. Hill*, xiv. 500. [See *Penrose v. Hart*, 1 *Dall.*, 378.]

b. WHEN PAYABLE ANNUALLY.

2. S. agreed to pay B. one thousand dollars at the end of five years, and one hundred and twenty dollars interest per annum during that period, reserving the right to pay the whole at any time; and further providing that if he should "at any time before the one thousand dollars fell due pay any part of it, he should be exonerated from interest on that part of the one thousand dollars which he might pay," and that "interest per annum be calculated on the remainder in the same ratio that one hundred and twenty dollars bears to one thousand dollars" — *Held*, that S. was exonerated from the payment of interest on so much of the principal as was paid by him from the date of such payment, but not from the payment of any interest which had previously accrued. *Stone v. Bennett*, viii. 41.

II. BY WHAT LAW REGULATED.

3. Where the plaintiff paid money in another State, for the use of the defendant, interest is recoverable according to the law of this State, unless the defendant shows that the rate of interest is less in the State where the liability occurred. *Hall v. Woodson*, xiii. 462.

III. INTEREST UPON INTEREST.

4. Parties cannot prospectively agree that interest on an account stated shall bear interest, but after interest has accrued and is due, it may be agreed that interest shall bear interest. *Gunn v. Head*, xxi. 432.

IV. PROCEEDINGS TO RECOVER.

5. Where there is no agreement to pay interest, an action for interest cannot be maintained after the principal is satisfied: but it is otherwise where there is an express contract to pay interest. *Stone v. Bennett*, viii. 41.

V. INTEREST IN SPECIAL CASES.

a. GARNISHMENT.

6. Where the answer of a garnishee denies his indebtedness to the defendant, and the answer is found untrue, the garnishee is liable for interest upon his actual indebtedness. (See R. S. 1835, 333, § 1.) *Stevens v. Gwathmey*, ix. 628.

7. Where money is deposited with a banking corporation by the cashier of another bank, who takes certificates therefor in his own name and transfers them to a third party, who sues for and recovers the amount of such principal deposit, in the courts of New York, while a garnishment suit is pending in this State for the same fund in favor of a creditor of the depositing bank—*Held*, that the depositary was not liable for interest in the garnishment suit on the principal of such deposit, although such suit was resisted and carried to the Supreme Court, on exceptions by the depositary, it appearing that such action was not adopted as a means of delay. *Cohen v. Perpetual Ins. Co.*, xi. 374.

b. FAILURE OF TITLE.

8. In case of entire failure of the title conveyed, a re-conveyance is unnecessary to a recovery of the purchase money. The statute of ejectment only allows a recovery of rents and profits from the occupant for five years next preceding suit brought. (R. S. 1845, 443, § 14.) Therefore, the recovery of interest by the occupant against his grantor on his covenant of seizin, should be limited to the same period, where the possession has been beneficial. *Lawless v. Collier*, xix. 480.

C. CERTIFICATE OF DEPOSIT.

9. A certificate of deposit, made "payable to the order of the depositor on return of the certificate, sixty days after date, with interest at the rate of six per cent. per annum," will bear interest after maturity as well as before. LEONARD, J., *dis.* *Payne v. Clark*, xxiii. 259.

D. COUNTY WARRANT.

10. A county warrant will bear interest after presentation and refusal of payment, but not before. (See R. S. 1825, 461, § 1.) *Robbins v. Lincoln County Court*, iii. 57. *Skinner v. Platte County*, xxii. 437.

E. AGENCY.

11. A right of action accrues against an agent for money received from the time of demand and refusal, and interest will be allowed from that date. *Per* TOMPKINS, J. *Benton v. Craig*, ii. 198.

F. INNKEEPER.

12. In an action against an innkeeper for the loss of goods committed to his charge, the jury may give interest upon the amount of the goods lost, by way of damages, but are not required to do so. *Sparr v. Wellman*, xi. 230.

G. INSURANCE.

13. Where a policy of insurance provided that the loss or damage, if any, should be paid in sixty days after due notice and proof thereof, interest should be allowed after the expiration of the sixty days, and not from the time payment was demanded. *St. Louis Ins. Co. v. Kyle*, xi. 278.

H. PENAL BOND.

14. Under the statute, (Gey. Dig. 239, § 1,) interest is recoverable as damages on a penal bond. JONES, J., *dis.* *Price v. Rector*, i. 167.

I. ADMINISTRATION.

15. An administrator is liable for interest on the money held by him, after an order of distribution. *Henry v. The State*, ix. 769.

16. In the distribution of estates the rule of law is that advancements shall not bear interest. *Nelson v. Wyan*, xxi. 347.

17. Where a testator made specific bequests of money and lands to his children, and directed that, in the final distribution of his effects, the various devises should be equalized, it was *held*, that no interest should be charged to those who received more than their proportion of lands at the first distribution. In this case the lands did not appear to be productive. *Ibid.*

See ADMINISTRATION, 160-162.

j. ON LOST BOND.

18. Where a bond for the payment of money has been lost or mislaid, the maker cannot be relieved from payment of interest during the time it was lost, unless he had made a tender of the money to the owner of it. *Rector v. Mark*, i. 288.

k. UNLIQUIDATED ACCOUNTS.

19. Under the statute which gave interest to creditors "on money withheld by an unreasonable and vexatious delay of payment," (R. S. 1825, 461, § 1,) it was held, that a creditor, who becomes such by paying money at the request of another, is entitled to interest from the time of the payment. *Chamberlain v. Smith*, i. 718.

20. Interest is recoverable as damages on a liquidated debt. *Stone v. Bennett*, viii. 41.

l. BONDS AND NOTES.

21. A note, bearing "ten per cent. interest from date," is to be construed as bearing interest at the rate of ten per centum per annum from date. *Finley v. Acock*, ix. 832.

22. A bond or note for the payment of a sum of money on a specified future day, "with eight per cent. interest," does not bear interest until the debt comes due. *Ayres v. Hayes*, xiii. 252.

See COMMON CARRIER, 12;...JUDGMENT, XII;...PRACTICE, 126;...SCHOOLS, 6;...USURY.

JAILS AND JAILERS.

1. Where a prisoner is committed to the jail of one county, for an offense committed in another, and a guard is employed, the county wherein the jail is situated is not liable for the expense of such guard. *Perry County v. Logan*, iv. 434.

2. Each county is required to keep a good and sufficient jail, and the State is not subject to any expense for guarding it. *The State v. Hinkson*, vii. 353.

3. In a change of venue, in a criminal case, the county to which the prisoner is removed is liable for all expense incurred in the employment of a guard for his safe keeping, the same as if the cause had originated in that county. [*Perry County v. Logan*, iv. 434, commented upon and explained.] *Berry v. St. Francois County*, ix. 356.

See COSTS, 33.

J U D G M E N T .

I. FORM.

II. BY CONFESSION.

- a. BEFORE COURT OF RECORD.
- b. BEFORE A JUSTICE.

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- a. IN COLLATERAL PROCEEDINGS.
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VII. FOREIGN JUDGMENTS.

- a. AUTHENTICATION.
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IX. WHEN SEVERAL PLAINTIFFS OR DEFENDANTS.

X. ARREST AND SETTING ASIDE.

XI. REMITTITUR OF DAMAGES.

XII. INTEREST ON.

XIII. ACTION ON.

XIV. SUPREME COURT JUDGMENT.

I. FORM.

1. A final judgment in favor of the defendant should be in this form : " It is therefore considered by the court, that the said plaintiff take nothing by his writ, and that the defendant go hence without delay, and recover against the plaintiff his costs," &c. *Lisle v. Rhea*, ix. 172. *Jones v. Hoppie*, ix. 173.

See CRIMINAL LAW, 358, 359.

II. BY CONFESSION.

a. BEFORE COURT OF RECORD.

2. A confession taken by a clerk of a Court of Record under the act of July 3d, 1807, (1 Ter. L. 118, § 37,) did not amount to a judgment, nor could execution issue thereon. It was competent for the clerk to take the *cognovit actionem*, upon which the court might proceed to pronounce judgment at the next term, or, if that should be omitted, at a subsequent term, as of the term next succeeding the confession, if the defendant had received notice of the proceeding, and did not

show sufficient cause why it should not be done. *JONES, J., dis. Holmes v. Carr*, i. 56. *Phelps v. Hawkins*, vi. 197.

3. Confession of judgment is a release of all errors in the declaration. *Parker v. Simpson*, i. 539.

4. An entry by the clerk that judgment was confessed in open court, and that the amount was liquidated by him at a certain sum, is not a judgment of the the court on which a recovery can be had. *Hill v. Fiernan*, iv. 316.

5. And the Circuit Court cannot make a judgment, confessed before a clerk, (1 Ter. L. 685, § 14,) its judgment, and thereby alter the time when a lien would commence. *Russell v. Geyer*, iv. 384.

6. A judgment, confessed by an attorney under a void letter of attorney, which has been revived by *scire facias* against the administrator of the judgment debtor, cannot be set aside, although the defect in the letter of attorney might have been pleaded in avoidance of the judgment, or given in evidence under the plea of *nul tiel record* on the *scire facias*. *Wood v. Ellis*, x. 382.

7. Where several powers of attorney are given to confess judgments on several debts between the same parties, it is competent and proper for the court to consolidate them, and enter but one judgment. *Genestelle v. Waugh*, xi. 367.

8. A judgment confessed by one partner, in the name of the firm, is void as to the co-partner, and an execution thereon is properly quashed on his application. *Morgan v. Richardson*, xvi. 409.

9. The president of a corporation is competent to appear and confess a judgment against it. *Chamberlin v. Mummoh Mininy Co.*, xx. 96.

10. The omission of the clerk to indorse the judgment upon the written statement of the defendant, in case of a confession of judgment, as provided in new code, (Acts 1848-9, 96, § 3,) is no ground for reversal, especially where the indorsement was made *nunc pro tunc*, before a motion to quash an execution was overruled. *Hull v. Dowdall*, xx. 359.

11. Where a judgment by confession was rendered by a clerk in vacation, under the act of 1849, (Acts 1848-9, 96, Art. XXII,) upon a verified statement, defective in that it did not sufficiently set forth the facts out of which the liability grew, it is not therefore a nullity, and its validity cannot be questioned collaterally. *Gilman v. Hovey*, xxvi. 280.

See LAWS, 30.

b. BEFORE A JUSTICE.

12. Where, in a suit before a Justice on a liquidated demand, the defendant appears on the return day of the writ and acknowledges the justice of the claim, and the Justice makes a record of it, this, although not a judgment by confession, has the force of a judgment by default, and the entry by the Justice of such acknowledgment, has the effect of a judgment. (See R. S. 1835, 362, §§ 1, 2.) *Davis v. Wood*, vii. 162.

13. A Justice may take a confession of judgment on a day other than a regular law day. [*Oyster v. Shumate*, xii. 580, and *Hunter v. Reinhard*, xiii. 23, OVERRULED.] *Huff v. Knapp*, xvii. 414.

14. Where a suit is begun by process, confession of judgment under the statute, (R. S. 1845, 656, § 2,) need not be in writing. [OVERRULING *Oyster v. Shumate*, xii. 580, and *Hunter v. Reinhard*, xiii. 23.] *Chamberlin v. Mammoth Mining Co.*, xx. 96. *Franse v. Owens*, xxv. 329. See EXECUTION, 4.

See HUSBAND AND WIFE, 92.

III. CONCLUSIVENESS AND EFFECT.

a. IN COLLATERAL PROCEEDINGS.

15. A judgment cannot be attacked collaterally, and invalidated by evidence *in pais*. *Montgomery v. Farley*, v. 233.

16. A judgment which is simply voidable, cannot be set aside in a collateral proceeding. *Perryman v. The State*, viii. 208.

17. Advantage may be taken of a void judgment in a collateral proceeding; but where the court had jurisdiction over the subject matter, and the defendant had notice of the proceedings against him, he is bound by them, however irregular or erroneous, and the judgment is conclusive on all parties and privies thereto in any collateral proceeding, and rights and titles acquired by virtue of an execution issued on such judgment will be protected. *McNair v. Biddle*, viii. 257.

18. But where a court of limited jurisdiction acts without authority, no writ of error lying from its judgments, the validity of its proceedings may be questioned in a collateral action. *The State v. Stephenson*, xii. 178.

19. The judgments of the courts of the United States cannot be impeached in a collateral way, but only by proceedings operating directly upon such judgments in the courts where they are rendered. *Per Scott, J. Reed v. Vaughan*, xv. 137.

20. A *scire facias* to revive a judgment against an administrator, instead of having a sheriff's return of service upon it, had an acknowledgment, signed by the administrator, that it was personally served upon him. A judgment by default was rendered against the administrator—*Held*, that the judgment was not void, and could not be objected to in a collateral proceeding. *Draper v. Bryson*, xvii. 71.

21. A judgment rendered in one county, in a suit taken by a second change of venue, by consent of parties from another county, though irregular, is not void; and a title acquired under it cannot be avoided in a collateral action. *Chouteau v. Nickolls*, xx. 442.

22. The plaintiff recovered a judgment against C., and an execution was issued thereon, and levied upon a lot that had been conveyed in May, 1844, to one D., in trust for the separate use of the wife of C. The plaintiff became the purchaser at the sheriff's sale, and brought suit, to which C. and his wife, and D. were parties, to obtain a decree, vesting in himself all the right, title and interest of D., the trustee, and of the wife of C. in said lot, on the ground that the same was conveyed to D. for the separate use of the wife, with intent to defraud and

hinder the creditors of the husband—*Held*, that the judgment against C., though conclusive against him as to the items upon which it was found, was not conclusive as against the other defendants, and that they might show that there was in fact nothing due upon them at the date of said conveyance. *Eddy v. Baldwin*, xxiii. 588. See SUPRA, 11.

b. BETWEEN SAME PARTIES OR PRIVIES.

23. Creditors of an estate suing a party as executor *de son tort*, who claims the property in dispute under a purchase from the deceased, may give in evidence judgments against the deceased, existing at the time of the supposed sale, although not between parties or privies. *Foster v. Nowlin*, iv. 18.

24. A judgment between the same parties, upon the same cause of action, is equally conclusive upon them in its effects as if it was specially pleaded. *Offutt v. John*, viii. 120.

25. The judgment of a court of competent jurisdiction cannot be impeached in a collateral proceeding by a party to the same; but a stranger may show that the judgment was obtained by fraud and collusion. *Callahan v. Griswold*, ix. 775.

26. A. purchased certain lots at a sale on an execution against B., and brought his suit against B. and also against C., in whom the legal title stood, asking that the title of C. might be divested and transferred to him, on the ground that the lots had been conveyed to C. to defraud the creditors of B. (of whom A. was one.) Both defendants appeared, and judgment was rendered for the plaintiff—*Held*, that this suit was a complete and final adjudication upon the title of B. to the lots in question, and that he could not afterwards set up title thereto, either on his own behalf, or in behalf of his creditors, on the ground that A. acquired the property by making a fraudulent use of a judgment confessed by B. in his favor. *Franklin v. Stagg*, xxii. 193.

27. A judgment recovered is conclusive as between the parties thereto, as to all matters directly in issue. This rule does not extend to matters collaterally or incidentally considered. *Ridgley v. Stillwell*, xxvii. 128.

c. FORMER JUDGMENT.

28. To constitute a former judgment a bar to a subsequent suit, it must appear to have been a decision upon the merits of the case. *Taylor v. Larkin*, xii. 103.

29. In a suit for the recovery of instalments of interest alleged to be due on a promissory note, the maker set up the defense that the note had been fraudulently altered so as to make interest payable from date, but the plaintiff recovered judgment—*Held*, that said judgment was conclusive against the maker, as to the question of fraudulent alteration, in a subsequent suit on the note itself. *Edgell v. Sigerson*, xxvi. 583. See PLEADING, 43–46.

d. RES ADJUDICATA.

30. The decision of a County Court upon a petition to sell land of an estate for the payment of debts, is not regarded as *res adjudicata*. *Callahan v. Griswold*, ix. 775.

31. Where a matter becomes *res adjudicata*, it is equally obligatory on both parties; if it is not binding on both, it binds neither. But it does not become so, unless tried upon its merits. If it has been rejected without an examination and trial upon the merits, it is no bar to a subsequent investigation of the same matter. *Bell v. Hoagland*, xv. 360.

See SUPRA, 23-27.

e. GARNISHMENT.

32. The maker of a note was summoned before a Justice as garnishee in an attachment suit against the payee. An indorsee of the note filed an interplea, claiming the debt by virtue of an indorsement before the date of the garnishment, and judgment was rendered against him on the interplea, from which he took no appeal, but afterwards withdrew the note, and sued the maker thereon—*Held*, that the judgment on the interplea was a bar to the latter action. *Richardson v. Jones*, xvi. 177. See also, *Richardson v. Watson*, xxiii. 34.

f. SET-OFF.

33. Where a party sued, pleads as a set-off a matter not properly so pleadable, and no objection is made thereto, the judgment will be final as to such matter of set-off, and a bar to any subsequent suit thereon. *Thompson v. Wineland*, xi. 243.

IV. ASSIGNMENT.

34. The effect of an assignment of a judgment is to authorize the assignee to receive the money thereon, and to use the plaintiff's name in prosecuting the same; and the fact of such an assignment is no defense to a suit on the judgment in the name of the assignor. *Bardon v. Savage*, i. 560.

35. A judgment was obtained against A. on a partnership debt of A. and B.; and afterwards the judgment was assigned to B., who caused suit to be brought on it in the name of the plaintiff against A.—*Held*, that the assignment of the judgment was no extinguishment of the debt, and that A. was liable therefor. *Ibid*.

36. Where a judgment was assigned, and the debtors, with notice of such assignment, paid the amount to the judgment creditor, who thereupon indorsed the amount on the execution, directing the sheriff to return the same satisfied—*Held*, that such indorsement might be vacated on motion, and a new execution issued for the benefit of the assignees of the judgment; but before such order could be made, all the judgment debtors were entitled to notice of such motion. *Laughlin v. Fairbanks*, viii. 367.

37. The owner of a judgment cannot assign a part of it, so as to affect the rights of the judgment debtor without his consent. *Love v. Fairfield*, xiii. 300.

38. Where A. furnished money to B. to purchase a judgment, and required it to be transferred to B., and B. afterwards assigned it to C., who had no

knowledge of A.'s interest, it was *held* that C. would hold the amount collected on the judgment against A. *Garland v. Harrison*, xvii. 282.

39. A judgment debtor will be protected in paying to the plaintiff in the judgment, as against an assignee, who has given no notice of the assignment. *Frissell v. Haile*, xviii. 18.

See PRACTICE, 285.

V. LIEN.

40. The statute (1 Ter. L. 855, § 61,) provided that "judgments rendered by Circuit Courts shall be a lien on the real estate of the person against whom they are rendered, situate in the county for which the court is held, and all liens shall commence on the day of the rendition of the judgment, and shall continue for three years thereafter," &c.—*Held*, that a judgment against an administrator, rendered October 1st, 1823, was no lien on the real estate of the intestate, although the judgment was *de bonis testatoris*. *Scott v. Whitehill*, i. 764.

41. The filing of a transcript of a judgment of a Justice with the clerk of the Circuit Court creates a lien from the time of filing, although an execution cannot issue on such transcript, till the Justice's execution has been returned *nulla bona*. *Wineland v. Coonce*, v. 296. *Bunding v. Miller*, x. 445.

42. A Justice's execution is a lien on all the goods and chattels of the defendant within the limits of the township to which the execution is directed, from the time of its delivery to the constable. *Brown v. Burrus*, viii. 26.

43. Under the statute, (R. S. 1835, 364, § 18,) it is not necessary, in order to acquire a lien on real estate, to file a full copy of the Justice's docket. It is sufficient to file a copy of the judgment. *Jones v. Luck*, vii. 551.

44. A person appointed constable for a special occasion, under the statute, (R. S. 1835, 352, § 20,) is to be regarded as a deputy of the proper constable, as to the lien of an execution in his hands. *Jones v. Hoppie*, ix. 173.

45. The lien of a judgment of a Circuit Court of the United States is not prolonged nor affected by the pendency of a writ of error in the Supreme Court. *Chouteau v. Nuckolls*, xx. 442.

46. Judgments and decrees rendered in the Circuit and District Courts of the United States, within any State, cease to be liens on real estate, or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State cease by law to be liens thereon. *Ibid.*

47. Judgments by confession, under the act of 1849, (Acts 1848-9, 96, Art. XXII,) are liens upon real estate. *Gilman v. Hovey*, xxvi. 280.

See ADMINISTRATION, 94; . . . LIEN, 12-15; . . . SUPRA, 5.

VI. PRIORITY AND MERGER.

48. By the statute of 1822, it was provided that certain enumerated debts of an estate should be first paid; among which were "debts due to the State," and

"judgments obtained against the deceased in his life-time, and rendered not more than one year before the death of the deceased;" (1 Ter. L. 927, § 29,) these two classes being named in the act in the order here given. It was also provided that, if, after paying the funeral expenses, there should not be assets sufficient to pay all the other claims mentioned in this privileged class, they should be paid in the order in which they stood arranged in the act. Judgment was obtained against one in his life-time, which, by the then existing law, entitled the plaintiff to satisfaction out of the defendant's lands, after the death of the latter. After his death, the State recovered judgment against his administrators for an amount due from him as a collector of taxes; and it was sought to obtain priority of satisfaction of this judgment over that rendered in his life-time, because of its being due to the State. But it was *held*, that the act did not intend to take from a creditor, on the death of a debtor, the right he had acquired to have his judgment satisfied out of the lands; that the above mentioned provision is merely directory to the administrator as to the manner in which he shall administer the assets; that the question of priority does not arise between these parties; and that their rights must be determined according to their priority of lien. *Finley v. Caldwell*, i. 512.

49. A judgment obtained against one in his life time, is not merged in a judgment founded on the same cause of action obtained after his death against his administrators. *Ibid*.

VII. FOREIGN JUDGMENTS.

a. AUTHENTICATION.

50. In authenticating records under Art. IV, § 1 of the Constitution of the United States, and the acts of Congress on that subject, the certificate of the presiding Judge that he is such, is sufficient evidence of the fact. *Hutchison v. Patrick*, iii. 65.

51. And a certificate by a Judge, authenticating a record of a judgment of another state, under the act of Congress, (1 U. S. Stat. 122,) in these words: "I certify that the certificate of the clerk is in due form of law," is sufficient. *Blair v. Caldwell*, iii. 353.

52. But where A. has certified a transcript of the record of a judgment of another State, as Clerk, the attestation of the Judge, under the act of Congress, (1 U. S. Stat. 122,) need not state that he is Clerk. *McQueen v. Farrow*, iv. 212.

53. Where a defendant, who is sued upon a foreign judgment, does not deny the judgment in his answer, but relies solely upon a set-off, he cannot object to the admission of the transcript in evidence on the ground that it is not properly authenticated. *McLean v. Boyle*, xix. 495.

54. A. sued B. on a judgment of another State. From the transcript offered in evidence, it appeared that the clerk who certified it was clerk of a court other than that in which judgment was rendered; it appeared also from his certificate, that the record of the cause had been transferred by law to the court of which

he was clerk, and it appeared from the record itself that two several executions had been issued by said clerk upon said judgment, and levies and execution sales made thereunder—*Held*, that the transcript was admissible in evidence, although no law authorizing the transfer was produced. *Manning v. Hogan*, xxvi. 570.

b. EFFECT AND VALIDITY.

55. A judgment obtained in another State, in a suit commenced by attachment, without service of process on the defendant, will not sustain an action in this State. *Chamberlain v. Faris*, i. 517. *Overstreet v. Shannon*, i. 529. *Sallee v. Hays*, iii. 116. *Webb v. Garner*, iv. 10.

56. The will of the sovereigns of Europe, in regard to the jurisdiction of their respective countries, is known through the judgments of their courts. *Marguerite v. Chouteau*, iii. 540.

57. The judgment of another State is *prima facie* evidence of jurisdiction of the person, where the writ was returned executed, although such return may be informal. *Wilson v. Jackson*, x. 329.

58. It is not sufficient in an action on such judgment, in a plea to the jurisdiction of the court rendering the judgment, to aver that the defendant was not a resident of the State. It must also be shown that he was not in the State. *Ibid*.

59. A judgment of a foreign court, having jurisdiction of the persons and the subject matter of the suit, is conclusive between the parties in the courts of this State. *Destrehan v. Scudder*, xi. 484.

60. In a suit upon a judgment rendered in a State, the laws of which, relative to the effect of judgments, correspond with those of the State where it is sought to be enforced, if it appears from the record that the defendant appeared by attorney, it is not admissible under the act of Congress of May 26, 1890, (1 U. S. Stat. 122,) to dispute the attorney's authority. *Warren v. Lusk*, xvi. 102.

61. A judgment by default was rendered in California against a resident of Missouri, upon publication. Afterwards the defendant appeared by attorney, filed his (the defendant's) affidavit, and asked leave to answer, which was granted on condition of payment of costs, but he failed to answer, when the former judgment was reinstated—*Held*, that the judgment was conclusive in this State. *Harbin v. Chiles*, xx. 314.

62. Where the judgment was rendered upon a confession made before the clerk in vacation, it is admissible to show a demand against the estate of a deceased person. *Harness v. Green*, xix. 323.

63. Where a judgment was entered in New Jersey *pro confesso*, by virtue of a warrant of attorney, signed by the defendant, empowering "any attorney of any court of record of the United States, to enter and confess judgment," the whole proceeding being consistent with the laws of said State—*Held*, that such judgment was entitled to "full faith and credit," although it did not appear that any of the parties were residents of that State, or had ever been there. *Scott, J., dis.* *Randolph v. Keiler*, xxi. 557.

64. A proceeding in a Probate Court of another State against a citizen of

this State on constructive notice only, is not a judicial proceeding within the meaning of the constitution of the United States (Art. IV, § 1). *Gillett v. Camp*, xxiii. 375.

65. Where in a suit on a judgment of another State, the record shows that the writ of summons was returned "executed in full," that is *prima facie* evidence of jurisdiction of the person. *Blackburn v. Jackson*, xxvi. 308.

66. Where a transcript of a judgment, rendered in another State, shows that the writ was executed by a deputy sheriff and returned by him as such, but states that it was duly and legally executed, the presumption is that it was done according to the laws of that State. *Lackland v. Pritchett*, xii. 484.

67. Where such transcript contains a commission from the Governor of the State to a person, appointing him special Judge for a term, the appointment is presumed to be legal, although the commission does not purport to be under the great seal of the State. *Ibid.*

See ADMINISTRATION, 98; . . . PLEADING, 169.

VIII. ERRONEOUS, VOID AND VOIDABLE.

68. A judgment for a greater amount of damages than that laid in the declaration is erroneous. *Carr v. Edwards*, i. 137. *Hayton v. Hope*, iii. 53. *Maupin v. Triplett*, v. 422. *Cox v. City of St. Louis*, xi. 431. *Beckwith v. Boyes*, xii. 440.

69. But under a declaration in debt on judgment, in two counts, the damages recovered exceeded those laid in either count alone, but were less than the aggregate damages claimed in the two—*Held*, that as it did not appear that the recovery was on only one judgment, there was no error. *Pinkston v. Stone*, iii. 119.

70. After the death of a party has been duly suggested on the record, an entry of judgment against him is clearly erroneous. *Wittenburgh v. Wittenburgh*, i. 226.

71. A judgment rendered in favor of a plaintiff who had died before its rendition, is not void, but only voidable. *Coleman v. McAnulty*, xvi. 173.

72. A judgment entered for the amount of a recognizance, to be discharged by a less sum, is erroneous. The defeasance cannot be regarded as surplusage, or as a distinct thing, so as to be struck out, or reversed, without affecting the judgment, but as a part of the judgment, and being erroneous, the whole must be reversed. *Steinback v. Lisa*, i. 228.

73. Where an adult appears by next friend, except in cases of coverture, it is irregular, and judgment will be set aside for that cause. *Jeffrie v. Robideaux*, iii. 33.

74. It is error to take judgment against a member of a firm who was not served with process, and who did not appear and answer. *Bascom v. Young*, vii. 1.

75. A judgment against a party who had no notice of the pendency of the

suit in which it was rendered, is absolutely void. *Smith v. Ross*, vii. 463. *Anderson v. Brown*, ix. 638.

76. A summons issued by a Justice, and made returnable in a time less than that required by law, is void, and a judgment by default rendered thereon is also void, and a party acquires no title under a sale on an execution under such judgment. *Scott, J., dis. Sanders v. Rains*, x. 770.

IX. WHEN SEVERAL PLAINTIFFS OR DEFENDANTS.

77. Where there are several defendants in a real action, as in a petition for the assignment of dower, a verdict in favor of one defendant, upon his separate plea, will not avail another defendant, against whom a judgment by default was rendered. *Lecompte v. Wash*, ix. 547.

78. Where an action is brought against several defendants, and all but one appear and demur successfully, a default may be entered against the one not appearing. *Lyon v. Page*, xxi. 104.

79. If A. brings an action against B. and C. for the possession of land bought by A., at an execution sale against B., and C. defends, and offers in evidence only a deed from B. to C., prior in date to the sheriff's deed, and this deed from B. to C. is declared fraudulent and void as against A., then judgment may issue as well against C. as B. *Marr v. McIntosh*, xxi. 541.

80. Where a suit is instituted in behalf of a county by an authorized agent, and the judgment of the Justice is against the county, and an appeal is taken to the Circuit Court, and judgment is there given against the appellant—*Quære*, whether it is error to enter judgment against the security in the recognizance alone? *St. Louis County v. Clay*, iv. 559.

X. ARREST AND SETTING ASIDE.

81. A judgment cannot be set aside at a subsequent term on affidavit showing that there has not been a legal service of the original writ. *Lindell v. Bank of Missouri*, iv. 228. *Rutgers v. Bank of Missouri*, iv. 315.

82. Where the final judgment in a cause is erroneous, it may be set aside at the term during which it was rendered, but not afterwards. *Ashby v. Glasgow*, vii. 320. *Brewer v. Dinwiddie*, xxv. 351.

83. And the Circuit Court has no power to insert a clause in a judgment giving the party against whom it is rendered leave to move to set it aside at the next term; and where, upon motion made in pursuance of such leave, the judgment was set aside at next term, and a new one rendered, it was treated by the Supreme Court as a nullity, and the first judgment reinstated. *Hill v. City of St. Louis*, xx. 584. *Shepard v. same*, xx. 589.

84. But where there is an irregularity in the rendering of judgment, it may be set aside at a succeeding term. *Stacker v. Cooper Circuit Court*, xxv. 401.

85. Thus, if after an order of reference in a cause is made, and while it is still standing unexecuted and in force, final judgment is rendered, the court may, at a subsequent term, recall the same and set it aside. *Ibid.*

86. A judgment will not be arrested for any cause not sufficient on general demurrer. *Woods v. The State*, x. 698.

87. Proceedings to set aside an irregular judgment will not affect any one who has acquired title under it, unless he is made a party. *Coleman v. McAnulty*, xvi. 173.

88. In a proceeding to set aside a will, the court arrested judgment as to two minor defendants who appeared by attorney and entered final judgment against adult defendants—*Held*, that judgment should have been arrested as to all. *Rush v. Rush*, xix. 441. See also *Randalls v. Wilson*, xxiv. 76.

89. Where there is a defective service of process upon one of several defendants, he is entitled to have a judgment by default against him and his co-defendants jointly set aside. Being an entire thing, it must be set aside as to all the defendants. *Smith v. Rollins*, xxv. 408.

90. Where a judgment is irregularly rendered against the provisions of a statute or the rules of court, the party against whom it is rendered is entitled to have it set aside without showing a meritorious defense to the action. *Doan v. Holly*, xxvii. 256.

91. But where a judgment is reversed in the Supreme Court, and the cause remanded to the Circuit Court, and the mandate of the Supreme Court is received by the clerk of the Circuit Court after the commencement of the term of said court, and the clerk, of his own motion, docketts the cause on the third day of the term, and the court renders judgment by default on the fourth day of the term, no rule of court appearing to be violated, the defendant is not entitled, as of right, to have this judgment set aside without showing a meritorious defense. *Ibid.*

See CHANCERY, 54–65.

XI. REMITTITUR OF DAMAGES.

92. Where a judgment is given by mistake for a greater sum than the demand, and the sum is correctly stated in any of the pleadings, the appellate court will not, on that account, reverse it, but will, under the statute, (R. S. 1835, 468, § 7,) allow the plaintiff, on his application, to enter a *remititur* as to the excess. *Atwood v. Gillespie*, iv. 423.

93. It is erroneous to give judgment for a greater sum than the damages claimed in the declaration. *Johnson v. Robertson*, i. 615.

94. But the plaintiff may enter a *remititur* for the excess, to avoid a new trial. *Hoyt v. Reed*, xvi. 294.

95. In remitting a portion of a judgment, a new judgment must be entered for the lesser sum. *Schilling v. Speck*, xxvi. 489.

XII. INTEREST ON.

96. Under a statute which provided that judgments recovered in any court of record shall bear interest at the rate of six per centum per annum only, (R. S. 1825, 461, § 1,) a judgment by confession on an indebtedness for work and labor, to bear interest at the rate of ten per centum per annum, is erroneous, notwithstanding the proviso in § 2 of same statute, allowing conventional interest at ten per centum per annum. *Benjamin v. Bartlett*, iii. 86.

97. A memorandum by the clerk at the foot of a judgment, that it should bear a certain rate of interest, forms no part of the judgment, and any error therein may be corrected on motion. *Fugate v. Glasscock*, vii. 577.

98. All judgments rendered since the act of January 15, 1847, (Acts 1846-7, 63, §§ 1, 2,) bear only six per cent. interest. *Hawkins v. Ridenhour*, xiii. 125.

XIII. ACTION ON.

99. Where the record shows that the payment of a judgment has been enjoined, and nothing further appears, it is a fatal ground of objection in an action on the judgment. *Blair v. Caldwell*, iii. 353.

100. Where, in a suit on a judgment, the petition alleges that a copy of the record of the judgment is filed therewith, the transcript of the record is not made such part of the petition that it may be the subject of demurrer. *Hall v. Harrison*, xxi. 227.

See LIMITATIONS, 31, 33.

XIV. SUPREME COURT JUDGMENT.

101. A judgment of affirmance by the Supreme Court is understood to be a judgment that the Circuit Court proceed to execute its own judgment, which is pronounced to be valid and in full force. *Meyer v. Campbell*, xii. 603. *Walter v. Tabor*, xxi. 75.

102. But where the Supreme Court designs to carry into effect its own judgment, a judgment of recovery must be superadded to the judgment of affirmance, and an execution from either the Supreme or Circuit Court may enforce this judgment; but when issued from the Circuit Court, it must be upon the judgment of the Supreme Court. *Meyer v. Campbell*, xii. 603.

103. And an order of the Circuit Court is not necessary where an execution is issued on such judgment from the Circuit Court. *Wilburn v. Hall*, xvii. 471.

See ADMINISTRATION, 33, 81-83, 95-98;...AMENDMENT, IV;...ATTACHMENT, XI;...BOATS AND VESSELS, 85-87;...CHANCERY, 54-65;...EJECTMENT, 54, 55;...ERROR, VI;...EXECUTION, 63;...FREEDOM, 18;...GARNISHMENT, VII;...JUSTICE OF THE PEACE, 31-33;...MECHANIC'S LIEN, 28;...PARTITION, 27;...PLEADING, 74-82, VIII;...PRACTICE, III, 198, 199;...RECOGNIZANCE, 20-24;...RECORD, 29-33;...RELEASE...REPLEVIN, VII;...SCIRE FACIAS, I, 16;...SET-OFF, IV.

JURISDICTION.

I. GENERALLY.

II. SUPREME COURT.

- a. WILLS.
- b. CERTIORARI.
- c. QUO WARRANTO.
- d. INJUNCTION.

III. CIRCUIT COURT.

- a. QUO WARRANTO.
- b. ADMINISTRATION.
- c. ASSAULT AND BATTERY.
- d. APPEAL FROM COUNTY COURT.
- e. TENANTS IN COMMON.
- f. WILLS.
- g. FORECLOSURE.
- h. IN REFERENCE TO THE AMOUNT DEMANDED.
- i. CONSTABLE'S BOND.

IV. COURTS OF PROBATE.

- a. ORIGINAL AND CONCURRENT.
- b. SET-OFF.
- c. TROVER.
- d. BOND.
- e. FRAUDULENT CONVEYANCE.
- f. WASTE.
- g. TITLE TO LAND.
- h. ADMINISTRATION SALE.
- i. RAY COUNTY PROBATE COURT.

V. JUSTICE OF THE PEACE.

- a. GENERALLY.
- b. REDUCTION OF DEMAND.
- c. PENAL BOND.
- d. ASSAULT AND BATTERY.
- e. BONDS, NOTES AND ACCOUNTS.
- f. TROVER.
- g. ESCAPE.
- h. CORPORATION.
- i. COVENANT.
- j. LANDS.

VI. ST. LOUIS COURT OF COMMON PLEAS.

VII. ST. LOUIS LAND COURT.

VIII. LAW COMMISSIONER'S COURT OF ST. LOUIS COUNTY.

I. GENERALLY.

1. A court has power to take cognizance of a motion for a rule against a party to show cause why a judgment of the court obtained by him, should not be set aside. *Franciscus v. Martin*, ix. 196.

2. A party may give jurisdiction to an inferior court by a voluntary renunciation of a part of his demand. *Hempler v. Sneider*, xvii. 258.

3. The new code blends the jurisdiction of courts of law and equity, so that a party is entitled to all the relief that would formerly have been afforded both by a court of law and equity. *Rankin v. Charless*, xix. 490.

4. Under the new code, (Acts 1848-9, 76, § 1,) the jurisdiction of the court is made to depend exclusively on the residence and presence of the parties, without any reference to the position of the land sued for. *Miller v. Thurmond*, xx. 477.

5. Inferior tribunals not proceeding according to the course of the common law, are confined strictly to the authority given by statute; and the ground of their jurisdiction must appear on the face of their proceedings. *The State v. Metzger*, xxvi. 65.

6. Jurisdiction will depend upon the nature of the action as determined by the petition, and not by the facts as they appear in evidence. *Patrick v. Abeles*, xxvii. 184.

II. SUPREME COURT.

a. WILLS.

7. The Supreme Court has no jurisdiction to examine into the sufficiency of the evidence on which a verdict was found, in proceedings under § 10 of the act relating to wills, (R. S. 1825, 792); but if the court admits incompetent testimony, this court will correct the error, as in other cases. *Dickey v. Malechi*, vi. 177.

b. CERTIORARI.

8. The constitution of this State having given to the Supreme Court "power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and other original remedial writs, and to hear and determine the same," (Art. V. § 3,) it is competent for that court, by *certiorari*, to remove a cause from the Court of Chancery, where the chancellor, who had been counsel for one of the parties, refused, in obedience to law, (1 Ter. L. 770, § 5,) to certify the same to the Supreme Court; and for the Supreme Court to proceed with the hearing of the cause, notwithstanding that clause of the constitution which declares that "the Supreme Court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only," (Art. V § 2.) *Rector v. Price*, i. 198.

c. QUO WARRANTO.

9. The Supreme Court has jurisdiction of informations in the nature of a *quo warranto*, under Art. V., § 3, of the constitution of Missouri. *The State v. Merry*, iii. 278.

d. INJUNCTION.

10. The Supreme Court has no power to grant injunctions. *Lane v. Charless*, v. 285.

III. CIRCUIT COURT.

a. QUO WARRANTO.

11. A proceeding by information in the nature of a *quo warranto*, is a civil proceeding; consequently the Circuit Court has jurisdiction thereof in St. Louis County. *Scott, J. dis. The State v. Lingo*, xxvi. 496.

b. ADMINISTRATION.

12. Sections 63 and 64 of the administration act of 1825, (R. S. 1825, 119,) were not intended to give exclusive jurisdiction to the County Court, in relation to enforcing a distribution among distributees. Where the records of the County Court show that all debts have been paid, that the amount of property has been ascertained, and that three years have elapsed since administration was granted, a distributee may maintain his action of debt in the Circuit Court against the administrator or his securities. *The State v. Rankin*, iv. 426.

13. The general control over executors and administrators, given to the Circuit Court by the statute, (R. S. 1835, 155, § 8,) is limited in its application to such cases as are not specifically provided for in other parts of the same act, and the act relating to administration. *Miller v. Woodward*, viii. 169.

14. While the administration of an estate is in progress before the County Court, which is competent to determine the matters relating thereto, the Circuit Court cannot, under the statute, (R. S. 1845, 330, § 6,) interfere to try the right to the property in question, or to compel the administrator to return it in his inventory. *Overton v. McFarland*, xv. 312.

See *INFRA*, 25.

c. ASSAULT AND BATTERY.

15. The Circuit Court had jurisdiction of indictments for assaults, &c., prior to the act of January 18, 1831, (2 Ter. L. 271,) declaring assaults, &c., offenses not indictable. *Wilder v. The State*, iii. 418.

d. APPEAL FROM COUNTY COURT.

16. Under the constitution of Missouri, (Art. V. § 8,) and the act of January 7, 1825, (R. S. 1825, 269, § 4,) the Circuit Court has jurisdiction of causes appealed from the County Court. *Boone County v. Corlew*, iii. 12.

e. TENANTS IN COMMON.

17. The act establishing the St. Louis Land Court, (Acts 1852-3, 90, § 2,) does not deprive the St. Louis Circuit Court of the jurisdiction of an action by one tenant in common to compel a co-tenant to account. *McCune v. Hull*, xx. 596.

f. WILLS.

18. The Circuit Court, under the statute relating to wills, (R. S. 1825, 792, § 10,) exercises an appellate and not an original jurisdiction, and this jurisdiction

is not affected or taken away by the act of January 7, 1825, (R. S. 1825, 270, § 6,) or the act of January 2, 1827, (2 Ter. L. 126, § 4.) *Dickey v. Malechi*, vi. 177.

19. Where a child of a testator is omitted or unprovided for in the testator's will, the Circuit Court, under the statute, (R. S. 1835, 621, § 33,) has jurisdiction of the petition of such child, praying for a distribution of such testator's estate agreeably to the provisions of § 30 of the statute, (R. S. 1835, 620,) although the legacies under the will have not been fully paid. (R. S. 1825, 795, § 20.) *Levins v. Stevens*, vii. 90.

g. FORECLOSURE.

20. The Circuit Court has jurisdiction of a suit to foreclose a mortgage, as well after as before the death of the mortgagor. *Ayres v. Shannon*, v. 282.

h. IN REFERENCE TO THE AMOUNT DEMANDED.

21. Under a statute prohibiting a plaintiff to institute a suit in the Circuit Court for any sum within the jurisdiction of a Justice, (Gey. Dig. 396, § 32,) the Circuit Court has jurisdiction of an action on several small demands consolidated, each of which is within the jurisdiction of a Justice, when the total amount exceeds that jurisdiction. The sum demanded is the only criterion to determine the jurisdiction. *Langham v. Boggs*, i. 476.

22. Where a declaration, filed in the Circuit Court, demands a sum above the jurisdiction of a Justice, it is error for the court to dismiss the suit for want of jurisdiction, without first having found that the amount due is within the jurisdiction of a Justice. *Frazer v. Shille*, i. 575.

i. CONSTABLE'S BOND.

23. The Circuit Court, under the statute, (R. S. 1835, 368, §§ 20-23,) has jurisdiction over all actions instituted against a constable on his official bond, regardless of the amount claimed. *Scott, J., dis.*, and refers to *The State v. Steel*, xi. 553. *Pollock v. Hudgens*, xii. 67.

See *INFRA*, 60, 65; . . . PARTITION, 30.

IV. COURTS OF PROBATE.

a. ORIGINAL AND CONCURRENT.

24. The act of 1825, relating to courts, (R. S. 1825, 268,) confers upon Courts of Probate exclusive original jurisdiction in all cases respecting the proof of wills and the granting of letters testamentary and of administration; and the act of 1827 relating to courts, (2 Ter. L. 125), transfers their jurisdiction entire to the County Court. *Graham v. O'Fallon*, iii. 507. *Jackson v. Jackson*, iv. 210.

25. Under the statute, (R. S. 1835, 156, § 15,) the County Court has exclusive original jurisdiction over all matters embraced in the first six clauses of that

section, concurrent jurisdiction with the Circuit Court of the cases enumerated in the seventh clause, and exclusive original power over the matters embraced in the remaining five clauses of the section. [OVERRULES *Erwin v. Henry*, v. 469.] *Miller v. Woodward*, viii. 169.

26. And although the County Court has exclusive original jurisdiction of controversies respecting the duties of administrators, yet that jurisdiction can only be exercised in the manner prescribed by statute. *Powers v. Blakey*, xvi. 437.

b. SET-OFF.

27. The County or Probate Court has not jurisdiction to hear or decide upon a set-off, claimed by an administrator, against a demand exhibited for allowance by a creditor of an estate, when the set-off exceeds the demand of the debtor. *Dunnica v. Thomas*, xv. 385.

c. TROVER.

28. Under the statute, (R. S. 1845, 92, § 8,) the County Court has jurisdiction of a demand against an estate for the value of a slave which the deceased converted to his own use in his lifetime. *Moore v. Brown*, xiv. 165.

d. BOND.

29. An action to recover a demand against an estate, on a bond with a collateral condition, may be maintained in the County or Probate Court. *The State v. Paul*, xxi. 51.

e. FRAUDULENT CONVEYANCES.

30. In case of a conveyance made in fraud of creditors, a Probate Court has no jurisdiction on the application of the administrator, though made at the instance of creditors, to order a sale of the land so conveyed for the payment of debts. *George v. Williamson*, xxvi. 190.

f. WASTE.

31. To give the County Court jurisdiction of a proceeding by a creditor against an administrator for waste, under the statute, (R. S. 1845, 104, §§ 1-4,) it must appear that there is an insufficiency of assets returned by the administrator to pay all demands allowed against the estate. *Powers v. Blakey*, xvi. 437.

g. TITLE TO LAND.

32. Although the County Court is invested with power to order a sale of real estate by an administrator or executor for the payment of debts, yet they have no jurisdiction to try titles to land. *Shields v. Ashley*, xvi. 471.

h. ADMINISTRATION SALE.

33. Administration was granted in Warren county, and the administrator applied for leave to sell real estate to pay certain claims allowed by the Circuit Court of Franklin county. It not appearing by the record that the Circuit Court

of Franklin had jurisdiction of the claims allowed by it against the estate, the judgment of the court below, refusing the application of the administrator, was affirmed. *Hughes v. Griswold*, vi. 245.

34. The County Court has jurisdiction to order a reservation of the personal and a sale of the real estate of a testator, to pay debts, notwithstanding the testator's will may direct that all his debts shall be paid out of the "personal effects of his estate." However erroneous the order may be, a sale under it is not void, and cannot be questioned in a collateral proceeding. *Overton v. Johnson*, xvii. 442.

35. *It seems*, that the accounts, lists, inventories and appraisements, which the statute requires to be filed with a petition for the sale of a decedent's real estate, are not necessary to give the court jurisdiction, and that a failure to file them will not render the sale void. *Ibid.* *Mount v. Valle*, xix. 621.

36. The objection that the order of notification to persons interested was made at a time when no term existed by law, and required their appearance at a time when no term could exist by law, will not prevail, unless these defects are shown affirmatively; the statute gives the County Court power to change the terms fixed by law. *Overton v. Johnson*, xvii. 442.

i. RAY COUNTY PROBATE COURT.

37. The Probate Court of Ray county has authority to order an executor to pay specific legacies. (Acts 1852-3, 390.) *Darneal v. Reeves*, xxv. 295.

V. JUSTICE OF THE PEACE.

a. GENERALLY.

38. In proceedings under the statute, (R. S. 1835, 349, § 10,) the necessity which existed for the exercise of jurisdiction by the Justice out of his township, need not appear of record, but may be shown by extrinsic testimony. *Lutes v. Perkins*, vi. 57.

39. The plaintiff sued before a Justice on an account "for one colt, \$50, and damages to the same, \$35," making his claim \$85—*Held*, that the Justice had jurisdiction, and that a writ of prohibition was therefore improperly issued. *Morris v. Lenox*, viii. 252.

40. A written acknowledgment of an indebtedness in a specific sum for a valuable consideration implies a promise to pay, and is a note within the meaning of the statute relating to the jurisdiction of a Justice. (R. S. 1835, 348, § 3.) *Finney v. Shirley*, vii. 42.

41. Where suit is brought before a Justice for a sum exceeding his jurisdiction, waiver of this error does not confer jurisdiction. *Stone v. Corbett*, xx. 350.

42. Where the amount of damages claimed by the plaintiff in a suit before a Justice is not expressly shown, the amount for which he accepts a judgment will be taken as the amount claimed; and although the plaintiff may, in the Justice's Court, enter a *remittitur* for the excess recovered beyond the Justice's jurisdiction, he cannot do this in the Circuit Court on appeal, so as to give jurisdiction. *Batchelor v. Bess*, xxii. 402.

43. A Justice has no jurisdiction except that conferred by statute. *Williams v. Bower*, xxvi. 601.

b. REDUCTION OF DEMAND.

44. The amount claimed in an action before a Justice must determine the question of jurisdiction; therefore, where the total amount of an account was above, but it was brought by credits within, the jurisdiction, the action was sustained. *Buckner v. Armour*, i. 534.

45. A. commenced an action against B. on an open account, amounting to more than ninety dollars. On the trial, B. secretly asked the Justice if he had jurisdiction, to which the Justice replied that he had, as A. did not claim more than ninety dollars. B. then went into the trial, during which A.'s attorney stated that he did not claim more than ninety dollars, and judgment was rendered for less than that sum—*Held*, that the judgment and execution issued thereon were not void. *Best v. Best*, xvi. 530.

c. PENAL BOND.

46. A Justice has no jurisdiction of penal bonds, except those of constables, where the demand does not exceed ninety dollars. (R. S. 1835, 368, § 23.) *Wimer v. Brotherton*, vii. 264.

d. ASSAULT AND BATTERY.

47. A Justice has no jurisdiction under the statute, (R. S. 1855, 977,) in cases of assault and battery, unless the offense was committed in his county; and where an appeal is taken to the Circuit Court, the defendant is entitled to have the prosecution dismissed if the transcript does not show that the offense complained of was committed in the county in which the Justice had jurisdiction. *The State v. Metzger*, xxvi. 65.

e. BONDS, NOTES AND ACCOUNTS.

48. A Justice has no jurisdiction of notes payable in specific articles for an amount exceeding ninety dollars. (See R. S. 1835, 348, § 3.) *Martin v. Chauvin*, vii. 277.

See BONDS, NOTES AND ACCOUNTS, 65.

f. TROVER.

49. A Justice has jurisdiction over actions of trover where the damage claimed does not exceed fifty dollars. (See R. S. 1845, 635, § 3.) *Smith v. Grove*, xii. 51. *Glasby v. Prewett*, xxvi. 121.

g. ESCAPE.

50. Under the statute which provided that Justices "shall have jurisdiction of all actions of trespass, and other actions brought to recover damages for injuries done to the person or property of any person, where the sum demanded does not exceed fifty dollars," (1 Ter. L. 620, § 1,)—*Held*, that a Justice has jurisdiction of an action against an officer for an escape. *Lockhart v. Hays*, i. 271.

h. CORPORATION.

51. A Justice has jurisdiction of a suit for the recovery of a fine imposed for the breach of the by-laws of a private corporation. (See R. S. 1835, 348, § 2.) *O'Brien v. Union Fire Co.*, vii. 38.

i. COVENANT.

52. Where the damages claimed upon a covenant do not exceed ninety dollars, a Justice has jurisdiction, (R. S. 1845, 635, § 3,) although from the covenant itself it may not appear but that the damages would greatly exceed that amount. *Joyce v. Moore*, x. 271.

j. LANDS.

53. A Justice has jurisdiction of a suit to recover a balance of the purchase money of land, where the credits allowed reduce the amount claimed to \$90. *Musick v. Chamlin*, xxii. 175.

VI. ST. LOUIS COURT OF COMMON PLEAS.

54. The St. Louis Court of Common Pleas has jurisdiction of actions of trespass against boats and vessels. (See R. S. 1845, 181, § 3—315, § 2.) *Holloway v. St. Bt. Western Belle*, xi. 147.

55. The St. Louis Court of Common Pleas has concurrent power with the Circuit Court to affirm the judgments of Justices on appeal. *Hardison v. St. Bt. Cumberland Valley*, xiii. 226. *St. Bt. Falcon v. Donohoe*, xiii. 231. *White v. Zule*, xiii. 233.

56. Under the new code, the St. Louis Court of Common Pleas has equity jurisdiction. *McLaughlin v. McLaughlin*, xvi. 242.

VII. ST. LOUIS LAND COURT.

57. The act of February 23, 1853, (Acts 1852-3, 90,) establishing the St. Louis Land Court, giving it exclusive jurisdiction in certain cases, did not oust the jurisdiction of the other courts in such cases, until the Land Court was organized by the election of a judge and clerk. *Mason v. Woerner*, xviii. 566.

58. A contract to make and deliver a written lease of a building, is "a contract relating to land," or some "right or interest in such land," within the meaning of the act establishing the St. Louis Land Court, (Acts 1852-3, 90, § 2,) and that court has exclusive jurisdiction of actions for the breach of such contracts, although the parties stipulate that in case of a refusal to execute the lease, a certain sum shall be paid by way of stipulated damages. *Brockman v. Dessaint*, xxi. 585.

59. Whenever, by the rules of equity, a party is entitled to have a right to land vested in him, the remedy may be had, in St. Louis County, in the Land Court. *Speck v. Wohlien*, xxii. 310.

60. Every Court has exclusive control of its own process. Thus, where an execution issued out of the Circuit Court of St. Louis county, the defendant may, on motion in that court, have a sale on such execution set aside for irregularity, without a resort to proceedings in the St. Louis Land Court. *Nelson v. Brown*, xxiii. 13.

61. The St. Louis Land Court has jurisdiction of a suit to subject a wife's separate estate to the payment of her debts. *Segond v. Garland*, xxiii. 547.

62. Where the Land Court rightfully obtained jurisdiction in a case, although the facts afterwards disclosed would have authorized a proceeding in another court, the Land Court should furnish relief. *Paul v. Fulton*, xxv. 156.

See SUPRA, 17.

VIII. LAW COMMISSIONER'S COURT OF ST. LOUIS COUNTY.

63. The Law Commissioner of St. Louis county has no jurisdiction of actions of trespass for false imprisonment. (See Acts 1846-7, 91.) *Dufres v. Washington*, xii. 572.

64. The Law Commissioner has no jurisdiction in an action on a penal bond in the sum of two hundred dollars. In actions on such bonds, the judgment is for the penalty which determines the jurisdiction of the court. *City of St. Louis v. Fox*, xv. 71.

65. The superintending control over Justices, given by the constitution to the Circuit Court, is not interfered with by the concurrent power conferred on the Law Commissioner. *Ladue v. Spalding*, xvii. 159.

66. The Law Commissioner has no authority to make an order for the sale of a boat, or to distribute the proceeds. *Blaisdell v. St. Bt. Wm. Pope*, xix. 538.

67. It is within the jurisdiction of the Law Commissioner to proceed by attachment against the property of persons sued in his court. *Luckey v. Seibert*, xxiii. 85.

68. Where a suit is commenced before a Justice for work and labor, and also to enforce a lien against the building, but out of time as to the latter, and no judgment is rendered as to the lien, the Law Commissioner has jurisdiction of an appeal taken in such case by the contractor. *Kinnear v. Jones*, xxiv. 83.

69. In replevin suits in the Law Commissioner's Court, where the plaintiff fails to prosecute his action, the Law Commissioner may render judgment against him for an amount exceeding \$150, and within the penalty of the bond given by the plaintiff. *Berghoff v. Heckwolf*, xxvi. 511.

See CHANCERY, I, 163;....CRIMINAL LAW, 243-249, IV.;....FORCIBLE ENTRY AND DETAINER, III.

JURY.

- I. RIGHT OF TRIAL BY.
- II. QUALIFICATIONS OF JURORS.
- III. PROVINCE OF THE JURY.
- IV. POLLING JURY.
- V. EVIDENCE BY GRAND JUROR.

I. RIGHT OF TRIAL BY.

1. The charter of the Bank of Missouri, (1 Ter. L. 540, § 27,) provided that, if the Bank should at any time refuse to pay specie for any of its notes, it should forfeit at the rate of five per centum per month, for each and every month such specie payment should be refused, in addition to the amount of such notes, "to be recovered in a summary way by motion" before a proper tribunal. Upon a motion being made for judgment against the bank, the bank demanded a trial by jury, which was refused—*Held*, that under the Constitution of this State, which declares "that the right of trial by jury shall remain inviolate," (Art. XIII, § 8,) as well as under an existing law, which provided that "if any party to a suit shall at any time before the trial of such cause, by himself or counsel require a trial by jury, the court before whom the suit is depending shall cause a jury to be empaneled for the trial thereof," (1 Ter. L., 851, § 42,) the bank had a right to a trial by jury, and the refusal to grant such a trial was error. *Bank of Missouri v. Anderson*, i. 244.

2. The meaning of the declaration contained in the constitution of this State, "that the right of trial by jury shall remain inviolate," (Art. XIII, § 8,) is, that with respect to facts, the trial shall be by twelve men, and they shall all and each of them be good and lawful men; they must have a good fame, and possess integrity and intelligence; they must not be aliens, vagrants, outlaws, nor under conviction of crimes. They must all be under oath when they try a fact or cause; they must all agree in their verdict; and the right to have disputed facts tried by such a jury, and in such a manner, is to remain inviolate. It is the right of all parties who are capable of being sued. *Ibid*.

See LAWS, 56.

II. QUALIFICATIONS OF JURORS.

3. In a suit for freedom, it is a good objection to a juror that he would feel bound by his conscience to find a verdict in favor of the plaintiff, notwithstanding the law should hold him in slavery. *Chouteau v. Pierre*, ix. 3.

4. In a suit in which a town is a party interested, the citizens' of such town are not competent jurors. *Eberle v. St. Louis Public Schools*, xi. 247.

III. PROVINCE OF THE JURY—See PRACTICE, 119-144.

IV. POLLING JURY.—See PRACTICE, 145, 146.

V. EVIDENCE BY GRAND JUROR.

5. In an action for slander, for saying that the plaintiff's wife swore falsely before the grand jury, the defendant justified by alleging the truth of the words spoken—*Held*, that under the statute, (R. S. 1845, 865, §§ 15, 17,) in such a case a grand juror cannot be permitted to testify how a witness swore before the grand jury. *Tindle v. Nichols*, xx. 326. See also *Beam v. Link*, xxvii. 261.

See CRIMINAL LAW, VI, VII;....LAWS, 38;....NEW TRIAL, 66.

JUSTICE OF THE PEACE.

I. COMMISSION.

II. ACTION AGAINST.

III. INDICTMENT FOR MISDEMEANOR.

IV. PRACTICE AND PROCEEDINGS BEFORE.

- a. JURISDICTION.
- b. STATEMENT.
- c. FILING INSTRUMENT SUED ON.
- d. LOST INSTRUMENT.
- e. PARTIES TO ACTION.
- f. LIMITATION.
- g. PROCESS.
- h. CONTINUANCE.
- i. NON-SUIT.
- j. EVIDENCE.
- k. JUDGMENT.
- l. NEW TRIAL.
- m. ABATEMENT.

V. RECORDS AND TRANSCRIPTS.

I. COMMISSION.

1. The omission of the Clerk of the County Court to affix the seal of the court to the certificate of election of a Justice, will not affect the validity of such election, or the rights of the Justice as such magistrate. (See R. S. 1835, 345, § 11.) *Carpenter v. The State*, viii. 291.

II. ACTION AGAINST.

2. An action cannot be maintained against a Justice for any judicial act of his, within his jurisdiction, although induced by malice and corruption; but it

is otherwise as to ministerial acts. *Stone v. Graves*, viii. 148. *Lenox v. Grant*, viii. 254.

III. INDICTMENT FOR MISDEMEANOR.

3. An indictment against a Justice for wilful misdemeanor in office, under the act of January, 1825, (R. S. 1825, 470, § 5,) must allege facts constituting a misdemeanor, and charge the act to have been done knowingly and corruptly. *The State v. Gardner*, ii. 23.

4. Where a Justice is indicted for a misdemeanor in office, it is not necessary that the prosecutor's name should be indorsed on the indictment. *The State v. Allen*, xxii. 318.

IV. PRACTICE AND PROCEEDINGS BEFORE.

a. JURISDICTION. See JURISDICTION V.

b. STATEMENT.

5. In suits before a Justice, the plaintiff must file a substantial statement of his cause of action. *Casey v. Clark*, ii. 11. *Odle v. Clark*, ii. 12.

6. And it is error for the Circuit Court to allow such statement to be filed, after a case has been taken before it by appeal. *Odle v. Clark*, ii. 12.

7. The want of a statement of the cause of action before a Justice, or a material defect in the declaration, is not cured by an appearance and defense. *Bartlett v. McDaniel*, iii. 55.

8. In a suit before a Justice, under the statute, (2 Ter. L. 89, § 1,) a statement of the cause of action is necessary only when damages are claimed for wrongs done. *Harryman v. Robertson*, iii. 449. *Harris v. Harman*, iii. 450.

9. In an action before a Justice, "for \$25 on account of an accepted order," it appeared that the defendant sold the plaintiff goods for the order, (which was drawn on him by a third party,) and afterwards refused to deliver the goods—*Held*, that the plaintiff could not recover, as his account filed was not a statement of his cause of action. *Wathen v. Farr*, viii. 324.

10. No formality is necessary in the statement of a cause of action before a Justice. *Early v. Fleming*, xvi. 154.

11. In an account on which a suit was brought before a Justice, the first item was "balance from 1851, \$97 50"—*Held*, that the generality of the item did not justify dismissing the suit. *Busch v. Diepenbrock*, xx. 568.

12. Where the statement of the cause of action filed with the Justice was in this form, "1855, Feb. 20. L. & S. to P. J. C., Dr. To 41 hams, 464½ lbs., at 10 cents, \$46 45. To 2 bbls. whiskey," &c.—*Held*, that the statement was sufficient, and that the plaintiff might recover under it for the property named, which had been wrongfully seized at the instance of the defendants, in an attachment suit against a third person. *Coughlin v. Lyons*, xxiv. 533.

C. FILING INSTRUMENT SUED ON.

13. The statute requiring the instrument sued on to be filed with the Justice (R. S. 1835, 350, § 6) is directory, and may be waived by the defendant, and is waived where no objection is taken till the case is appealed to the Circuit Court. *Sublett v. Noland*, v. 516.

14. The fact that an instrument, which is the foundation of an action, is not filed with the Justice, is no ground for dismissing the suit; at most it is but a ground of continuance. *Boatman v. Curry*, xxv. 433.

15. Under the statute (R. S. 1845, 638, § 7) in a suit to recover the balance due on a subscription to the capital stock of a plank road company organized under the act of 1851, (Acts 1850-1, 259,) it was not necessary to file the original articles of association executed by the defendant and others for the purpose of organizing the company. *Hannibal Plank Road Co. v. Robinson*, xxvii. 396.

D. LOST INSTRUMENT.

16. Where the instrument sued on before a Justice is lost, the statute does not require that affidavit filed shall state that the loss was by accident. *Harryman v. Robertson*, iii. 449.

E. PARTIES TO ACTION.

17. In an action on an account, commenced before a Justice, an account made out in the name of the wife of the plaintiff, is sufficient to justify the plaintiff in proving and recovering the amount. *Brown v. Fricke*, i. 440.

18. The name of each member of a firm must be stated in an action brought by them on a note payable to the firm. *Revis v. Lamme*, ii. 207.

19. It is erroneous, in a case appealed from a Justice, to strike out on the trial, two of several plaintiffs; (Acts 1848-9, 87, §§ 5, 6,) the recovery must be in the name of all the plaintiffs, or none. The new code does not, except Art. XXV, apply to Justices' courts. *Flemm v. Whitmore*, xxiii. 430.

F. LIMITATION.

20. The date at the head of an account sued on in a Justice's court, does not preclude the plaintiff from proving the true time when the various items accrued. It does not pre-suppose the entire indebtedness to have accrued prior to that time. *Mooney v. Williams*, xv. 442.

G. PROCESS.

21. Proceedings in an action before a Justice were set aside because the summons did not run in the name of the State. *Charless v. Marney*, i. 537.

22. Where a summons, issued by a Justice, required the defendant, in an action of debt, to answer a demand for the penalty given by an act of the Legislature, entitled, "An act to regulate ferries," whereas, the proper title of the act was, "An act regulating ferries"—*Held*, that as the summons would have been as good without the title given to the act, as it would have been with it, the

misrecital, being of a matter that need not have been stated, is clearly surplusage, and is not fatal. *Eckert v. Head*, i. 593.

23. The Legislature, in repealing the provision in the statute, requiring a brief statement, &c., to be filed with the Justice, repealed, also, by implication, the provision requiring a copy of such instrument to be annexed to the summons and read to the defendant. (See R. S. 1825, 473, § 5; 2 Ter. L. 89, § 1.) *Neil v. Dillon*, iii. 59.

24. Where no arrest is made on a *capias* sued out before a Justice, under the statute, (R. S. 1825, 474, § 7,) but it is served as a summons, such service is sufficient. *Tompkins, J., dis. Myers v. Woolfolk*, iii. 348.

25. A Justice, in authorizing a person to serve process, under the statute, (R. S. 1835, 352, § 20,) is not restricted in the appointment to inhabitants of his own township. *Lutes v. Perkins*, vi. 57.

26. Making a writ returnable to a day not the regular law day of the Justice, is not a ground for dismissing the suit. *Harper v. Baker*, ix. 115.

27. A summons issued by a Justice, and made returnable in a less time than the law prescribes, is void, and an appearance by moving to set aside the judgment by default, or to dismiss the suit, does not cure the defect. *Williams v. Bower*, xxvi. 601.

h. CONTINUANCE.

28. Where a Justice refuses to grant a continuance, an application to the Circuit Court for a *mandamus* is the proper course. *Harper v. Baker*, ix. 115.

i. NON-SUIT.

29. Where judgment of non-suit is rendered against a party by a Justice, he is not thereby barred from instituting a new suit for the same cause of action. *Ellington v. Crockett*, xiii. 72.

j. EVIDENCE.

30. In suits before a Justice, the defendant may deny under oath at the time of trial, the execution of an instrument sued on, and may also, at the time of trial, object to the admission of an instrument offered in evidence on the ground of a variance between the instrument offered and the one described in the summons. *Kennerly v. Weed*, i. 672.

k. JUDGMENT.

31. C. sold a clock to D., and gave his written warranty that it was a good time-piece. D. gave his bond for the price, which C. sold, and the purchasers brought suit thereon against D. before a Justice, and the case was taken to the Circuit Court by appeal. D. offered to prove, as an equitable defense, under the act of 1831, (2 Ter. L. 284,) that the bond sued on was given for the clock, the warranty and its breach, and that he could not find C. to make a return of the clock to him, or sue on the warranty—*Held*, that the defense was good in equity, and might be made in the case under the act of 1831. (Reviewing same case, iii. 331.) *Davis v. Cleveland*, iv. 206. *Wilcox v. Powers*, vi. 145.

32. The Circuit Court cannot compel a Justice by mandamus to alter the entry of a judgment upon his docket. *It seems*, that if the entry does not show whether the judgment was upon the merits or not, parol evidence would be admissible in a second suit on the same demand, to show the true character of the judgment, and thus avoid its effects as a bar. *Garnett v. Stacy*, xvii. 601.

33. A judgment rendered by a Justice is void, unless it appears on the face of the proceedings, that the Justice acquired jurisdiction of the cause by service of process on the defendant, or by his appearance. *Bersch v. Schneider*, xxvii. 101.

I. NEW TRIAL.

34. Under the statute, (R. S. 1825, 475, § 12,) a Justice has no power to grant a new trial, except in cases of non-suit and of judgment by default. *Downing v. Garner*, i. 751. *Cason v. Tate*, viii. 45.

35. Where a judgment of non-suit is entered up by a Justice, in consequence of a failure of testimony, he has authority under the statute, (R. S. 1835, 359, § 3,) to set aside the judgment of non-suit, and grant a new trial. *Fenton v. Russell*, vi. 143.

M. ABATEMENT.

36. In a trial before a Justice, the defendant is not required to swear to his abateable defense, and evidence may be given in support of it after the trial has proceeded in chief. *Henry v. Lane*, ii. 201.

See APPEAL, VII; . . . ACTION, IV; . . . MANDAMUS, 20; . . . REPLEVIN, IX.

V. RECORDS AND TRANSCRIPTS.

37. Original papers, in a proceeding before a Justice, which are not certified, are not evidence in the Circuit Court, without proof of their authenticity. *Hickman v. Griffin*, vi. 37.

38. The docket of a Justice is evidence of nothing but what the law requires to be written therein. *Perry v. Block*, i. 484. *Brown v. Pearson*, viii. 159.

39. A Justice may embrace several judgments in one certificate. It is not necessary that each judgment should be separately certified. *Perryman v. The State*, viii. 208.

40. A transcript of proceedings had before a Justice, who is out of office, certified by the Justice in possession of the docket, is evidence of such matters as are properly on the docket, and where the party against whom the transcript is offered, objects to its admission on account of its containing irrelevant matter, he must point it out and ask the court to exclude it. *Palmer v. Hunter*, viii. 512.

41. In order to authenticate, for the purpose of evidence, copies of proceedings had by a former Justice whose term of office has expired, there must be some proof to show that the Justice who certifies the copy is successor to the one before whom the proceedings were had, and became thereby possessed of his docket and papers. *Halsted v. Brice*, xiii. 171.

42. In ejectment on a sheriff's deed for property sold under executions issued

from the Circuit Court, founded on transcripts of judgments and proceedings under them before a Justice, appearing from the transcripts to be regular, the oral testimony of the Justice, and papers produced by him purporting to be the original executions, differing from those copied in the transcripts, are not admissible to show irregularity in the proceedings before the Justice, and to assail the plaintiff's title. [*Coonce v. Munday*, iii. 373, modified. *Stevens v. Chouteau*, xi. 382, commented upon.] *Murray v. Laften*, xv. 621.

43. A certified transcript from a Justice, is evidence, without proof of his signature. *McDermott v. Barnum*, xix. 204.

44. Where one Justice certifies the records of another Justice, who is dead, it will be presumed, *prima facie*, that the Justice so certifying is in the lawful possession of the docket of the deceased Justice. *Linderman v. Edson*, xxv. 105.

45. An authentication of a transcript of a judgment by a Justice, thus: "I certify that the foregoing contains an entry made on my docket, [signed,] A., B., J., P.," is sufficient. *Franse v. Owens*, xxv. 329.

See EVIDENCE, 67, 68; . . . EXECUTION, 6-12.

LANDLORD AND TENANT.

I. LEASE.

- a. SUFFICIENCY.
- b. CONSTRUCTION AND EFFECT.
- c. RIGHTS ACQUIRED UNDER.
- d. FORFEITURE AND SURRENDER.
- e. ASSIGNMENT.

II. TENANT'S LIABILITY.

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- h. CONDEMNATION TO PUBLIC USE.

VI. NOTICE TO QUIT.

VII. REPAIRS.

VIII. TENANT CANNOT DISPUTE LANDLORD'S TITLE.

IX. ST. LOUIS ACT.

I. LEASE.

a. SUFFICIENCY.

1. An instrument is not a lease until the lessor's signature is affixed thereto. *Clemens v. Broomfield*, xix. 118.

2. The trustees of the town of St. Charles had power under the statute (R. S. 1825, 211,) to lease the common of the town, and it is not sufficient to invalidate such a lease, that it was executed in the name of the trustees of the town, and not in the name of "the inhabitants of the town of St. Charles," the corporate name of the town. *McDonald v. Schneider*, xxvii. 405. See PUBLIC LANDS, 21.

b. CONSTRUCTION AND EFFECT.

3. Where it was recited in a lease that the demised land was subject to a payment of a certain sum per annum, and no more, it is no breach that there was, at the time, a right of dower in the land, which afterwards becomes an incumbrance to the extent of the annual value of such dower. *Blair v. Rankin*, xi. 440.

4. The defendant leased to the plaintiff a hotel for one year, and covenanted to make certain improvements upon it, which he neglected to do. At the end of the year the lease was renewed for two years, and the new lease contained a covenant to have the same work done—*Held*, that the renewal of the lease with such a covenant was not a waiver of the damages sustained by reason of the breach of the covenant in the first lease. *Walker v. Seymour*, xiii. 592.

5. A parol lease for a term of years, though by § 1 of the statute of frauds declared to create a tenancy at will, has the effect of creating a tenancy from year to year. *Kerr v. Clark*, xix. 132.

6. Although a covenant for quiet enjoyment is implied from the word "demise" in a lease, this implication is not raised where it is expressly stipulated in the lease that nothing therein contained shall be construed to imply a covenant for quiet enjoyment. *Maeder v. City of Carondelet*, xxvi. 112.

7. A., by indenture dated January 1, 1842, demised certain premises "for and during the full and complete term of fifteen years from the date thereof, to be completed and ended on the thirty-first day of December, 1857, inclusive"—*Held*, that the term was one for only fifteen years. *Biddle v. Vandeventer*, xxvi. 500.

8. In the absence of any agreement between a landlord and his tenant, the rent will be payable at the end of the year. *Ridgley v. Stillwell*, xxvii. 128.

9. A lease to an infant is not absolutely void, but voidable only; and it is not for third persons to set up the defense of infancy. Leases to infants are, like all other contracts, voidable at their election. *Griffith v. Schwenderman*, xxvii. 412. See REVENUE, 4.

c. RIGHTS ACQUIRED UNDER.

10. A lessor granted to his lessees the privilege of doing all such quarrying on the land leased as might by them be deemed requisite and proper for carrying on

their business of boat building—*Held*, that the lessees acquired a property in the rock quarried. *LEONARD, J., dis. McKee v. Brooks*, xx. 526.

d. FORFEITURE AND SURRENDER.

11. The removal of a tenant and the delivery of the key to the landlord before the expiration of the term, does not, by operation of law, amount to a surrender of the term. *Prentiss v. Warne*, x. 601.

12. Where, by the terms of a lease, the rent is to be paid quarter yearly, and if it is not paid then, or within ten days thereafter, the lease is to be forfeited, a tender of the rent before the expiration of the quarter will not prevent a forfeiture of the lease. *Illingworth v. Miltenberger*, xi. 80.

13. In a tenancy from year to year, a surrender by operation of law takes place when, by the consent of both parties, another person becomes tenant of the premises, and the landlord collects rent from him. *Clemens v. Broomfield*, xix. 118.

14. The trustees of the town of Carondelet were authorized by statute, (Acts 1838-9, 210,) to grant leases of the land belonging to the corporation, and were clothed with "all the power and authority necessary to carry into effect the objects of the act, and to do all acts that might be proper for that purpose"—*Held*, that under the statute the trustees of the town might, in accordance with a town ordinance to that effect, make leases containing a clause of forfeiture for the non payment of rent, and that such forfeiture, when declared, could not be relieved against, although no demand of rent had been previously made. *LEONARD, J., dis. Taylor v. City of Carondelet*, xxii. 105. *City of Carondelet v. Lannan*, xxvi. 461. *Huth v. City of Carondelet*, xxvi. 466.

15. And so also under the act of 1824, (R. S. 1825, 211.) *City of Carondelet v. Lannan*, xxvi. 461. See FORFEITURE.

e. ASSIGNMENT.

16. The words "grant or demise," used in the assignment of a lease, do not create an implied covenant against the assignor of a lease. *Blair v. Rankin*, xi. 440.

17. The assignor of a lease is not liable to the assignee for a breach of the covenants in the lease by the original lessor. *Ibid.*

II. TENANT'S LIABILITY.

18. Where the clerk of the lessee of a storehouse wantonly fired a can of powder, and blew up the building—*Held*, that the lessee was responsible for the damage to the building. *Mason v. Stiles*, xxi. 374.

See *INFRA*, 32-34.

III. TENANT'S REMEDY.

19. A tenant cannot recover damages from his landlord which are caused by a nuisance on the demised premises, unless he alleges and proves that the defendant is liable on some contract, or that the nuisance arises from some act with which he is connected. *Vai v. Weld*, xvii. 232.

IV. LANDLORD'S LIEN.

20. The landlord's lien upon the crops grown on the demised premises in any year for the rent of that year, (R. S. 1845, 688, § 14,) must be enforced by process of law. Rent may be reserved, however, in such a way that the landlord will not be entitled to his lien. *Knox v. Hunt*, xviii. 243.

21. The lien continues eight months, and during that time the landlord may take steps to subject the crop to the payment of the rent. If the property remains in specie in the hands of an assignee, he may, during the continuance of the lien, seize it under process, or might, if it was consumed, hold the assignee accountable for its value, if the assignment was voluntary, or taken with a knowledge of the existence of the lien. The crop, during the continuance of the lien, would not be subject to the process of the law at the suit of any other creditor, without payment of the rent, as the lien of the landlord would protect it from sale. Nothing can be seized under execution which cannot be sold. *Ibid*.

V. RENT.

a. ACTION TO RECOVER.

22. Assumpsit for use and occupation, or for money had and received from a sub-lessee for use and occupation, will not lie where there is no privity of contract, expressed or implied, between the parties. *O'Fallon v. Boismenu*, iii. 405.

23. In an action for use and occupation, an eviction of part of the premises may be shown in reduction of the rent; but a mere trespass, or illegal ouster, does not constitute an eviction. *McFadin v. Rippey*, viii. 738.

24. In an action for use and occupation under the statute, a parol demise is evidence of the *quantum* of damages. (See R. S. 1835, 377, § 12.) *Warne v. Prentiss*, ix. 540.

25. As the action of use and occupation can only be maintained where the relation of landlord and tenant exists, it is unnecessary for the plaintiff to show title. *Hood v. Mathis*, xxi. 308.

26. An action for use and occupation cannot be maintained unless the relation of landlord and tenant exists between the parties, founded on an agreement express or implied. *Cohen v. Kyler*, xxvii. 122.

27. Where rent was to be paid at the end of each three months, during the continuance of the lease, the lessor cannot maintain an action therefor at the end of one month. *Garvey v. Dobyns*, viii. 213.

28. It is no defense to an action for rent under an express covenant, that a rise in the river rendered a part of the leasehold premises untenable; and if the defendant files an answer by way of set-off for damages sustained thereby, it will be stricken out on motion. *Niedelet v. Wales*, xvi. 214.

29. A plea of surrender, besides stating that the tenant left the house, and delivered the possession thereof to the landlord or his agent, must state the landlord's acceptance of possession and his discharge of the tenant. *Kerr v. Clark*, xix. 132.

30. Where a landlord seeks to recover possession of the demised premises under the statute, (R. S. 1855, 1016, §§ 32-40,) the statement filed by him must set forth the amount of rent actually due, and that the same has been demanded from the tenant. *Vaughn v. Locke*, xxvii. 290.

31. And where the premises have been sold, the vendee's complaint must set forth the amount due to him and not that which is due to his vendor. *Ibid.*

See ADMINISTRATION, 66.

b. TENANT'S LIABILITY.

32. Where a tenant abandons the leased premises, by consent of the landlord, during a current quarter, he is liable for rent to the expiration of such quarter. *Prentiss v. Warne*, x. 601.

33. Where the law creates a duty, and the party is prevented from performing it, without any default in him, and he has no remedy over, the law will excuse him. But where the party, by his own contract, creates a charge or duty upon himself, he is bound to make it good, notwithstanding any accident, because he might have provided against it by his contract. *Davis v. Smith*, xv. 467.

34. Thus, the lessees of a grist and saw mill and carding machine, are bound to pay the stipulated rent, notwithstanding the main posts of the building, supporting the machinery, were decayed, in consequence of which the building fell and destroyed all the machinery, as it was equally in the knowledge of both parties that the posts were liable to such defects. *Ibid.*

c. DISTRESS.

35. The right of distress for rent, or of beasts for breaking the close, does not exist in this State. *Crocker v. Mann*, iii. 472.

36. Where goods are illegally taken under a warrant to distrain for rent, under the provisions of § 9, of the act relating to landlords and tenants in St. Louis county, (Acts 1842-3, 248,) and money is paid to have them restored, an action will lie to recover back the money. *Quinnett v. Washington*, x. 53.

37. In such action double damages are not recoverable. *Ibid.*

See LAWS, 74.

d. LIABILITY OF ASSIGNEE OR PURCHASER.

38. The assignee of a lease assigned by way of mortgage is not liable to the lessor for the rent of the demised premises, unless he enters into possession. *McKee v. Angelrodt*, xvi. 283.

39. But a purchaser at sheriff's sale, under execution, of a lessee's estate and

interest in the demised premises, is liable to the lessor for the after-accruing rents, whether he enter into possession or not. *Smith v. Brinker*, xvii. 148.

e. FEE-FARM RENT.

40. A fee-farm rent will be upheld in this State. *Alexander v. Warrance*, xvii. 228.

f. HUSBAND AND WIFE.

41. Where the husband and wife abandon the possession of premises, occupied by the wife previous to their marriage free of rent, and upon which she had a growing crop, and, after such abandonment, the husband converts to his own use the crop, he will not thereby be rendered liable for the rent of the premises. *Dillon v. Wilson*, xxiv. 278.

g. ABANDONMENT.

42. Where a lessor by his wrongful act defeats the enjoyment of the property by the lessee, the latter may abandon the possession of the premises and exonerate himself from liability to pay rent. *Jackson v. Eddy*, xii. 209.

h. CONDEMNATION TO PUBLIC USE.

43. The plaintiff leased a lot to the defendant for a term of years, and afterwards joined the owners of adjoining lots, in a deed, by which a portion of the lot leased was conveyed to the city of St. Louis; this deed contained this clause, "it being understood that some of said first parties have made leases for portions of the wharf property hereby conveyed, the terms of which have not expired; and the conveyance to the city is made by said first parties subject to said leases now in existence;" the portion thus conveyed by the plaintiff to the city was duly condemned and appropriated to public use—*Held*, that the conveyance to the city carried with it, as incident to the reservation conveyed, a proportionate part of the rent, the clause not amounting to a reservation of the rent to the grantor. *Biddle v. Hussman*, xxiii. 597.

See SUPRA, 8; . . . WAY, 26, 27.

VI. NOTICE TO QUIT.

44. Where a guardian leases estate of his ward for a term of years, and after the expiration of the guardianship but before the expiration of the lease, rent was accepted by the plaintiff—*Held*, whether the lease was void, or. merely voidable, that the acceptance of rent implied a tenancy from year to year and entitled the tenant to notice to quit. *Tiernan v. Johnson*, vii. 43.

45. A lease made by an agent in his own name is void, and the tenant entering under such lease is a tenant at will, and as such entitled to notice to quit before an action of ejectment will lie against him. *Murray v. Armstrong*, xi. 209.

46. A purchaser in possession, under a contract for a deed, is not entitled to notice to quit. On breach of his contract he is liable to be turned out as a trespasser, and for mesne profits. *Glascock v. Robards*, xiv. 350.

47. Although rent be made payable monthly, yet, if the letting be general and without limitation as to time, it will be a tenancy from year to year, and a month's notice to quit will not terminate the tenancy. *Ridgely v. Stillwell*, xxv. 570.

VII. REPAIRS.

48. Unless the lease contains a covenant that the landlord shall repair, he is not bound to do so. *Vai v. Weld*, xvii. 232.

49. A. leased to B. a farm, with "water privileges from the mill-pond for turning a wheel to drive a saddle-tree manufactory"—*Held*, that A. was not bound to keep the mill-dam in repair, nor to keep sufficient water in it to drive the saddle-tree factory. He was only liable for some *misfeasance* in respect to the matter, and not for any *nonfeasance*. *Morse v. Maddox*, xvii. 569.

50. It is no defense to a suit for the recovery of rent, that the defendant had entered into the occupancy of the premises under an agreement with the plaintiff that he would execute a lease therefor for the term of three years, and would make certain repairs, the making of the repairs not being a condition of the leasing, and that the plaintiff neglecting and refusing to do the same, he abandoned the premises and repudiated the contract. *Goodfellow v. Noble*, xxv. 60.

VIII. TENANT CANNOT DISPUTE LANDLORD'S TITLE.

51. It is not necessary for a landlord to prove his title to premises, to sustain an injunction against his tenant for cutting and carrying away timber. The tenant cannot dispute his landlord's title. *Parker v. Raymond*, xiv. 535.

52. If a lessee of a tenement for one year holds over, it is presumed that he has rented it for another year, and not that he is a trespasser; and if he underlets the premises, his lessee cannot dispute his title. *Stoops v. Devlin*, xvi. 162.

IX. ST. LOUIS ACT.

53. The act of 1843, (Acts 1842-3, 247, §§ 1-4,) gives no lien, unless the rent be due and the amount of it certain. *Glasgow v. Ridgeley*, xi. 34.

54. Under the act of 1845, (R. S. 1845, 1101,) upon a failure of payment of rent, the landlord is entitled to his action for the recovery of possession against the tenant or other person in possession, and cannot be defeated by a transfer of the possession, or by an abandonment of it by the tenant and the intrusion of a stranger. *Willi v. Peters*, xi. 395. *Harley v. McAuliff*, xxiv. 85.

55. And an affidavit, in a proceeding against A. and B., under that act, which states a lease by plaintiff to A. and a demand of rent of B., the person occupying the premises, is not rendered defective by reason of its not charging privity between plaintiff and B., or by its not stating that the relations of landlord and tenant existed between them. *Shepard v. Martin*, xxv. 193.

56. But an affidavit, under that act, which states that a certain lot was let to defendant for a term of twenty years at a certain rent; that the sum of \$695,50 is now due; that the same has been demanded and payment has not been made; but which does not state of whom defendant leased the lot, or who was his landlord, or to whom he owed the debt due for rent, is defective, and its defectiveness may be taken advantage of by motion in arrest of judgment. *Evans v. Muller*, xxv. 195.

57. The sole object of a proceeding under the Landlord and Tenant Act of St. Louis County and the supplementary acts, (R. S. 1845, 1101—Acts 1846–7, 90—Acts 1848–9, 65,) is to restore possession of the premises to the landlord, and neither the Justice nor the appellate court is authorized to ascertain the amount of the rent due so as to bind the tenant collaterally in an action on the appeal bond. *Harley v. McAuliff*, xxvi. 525.

See ESTOPPEL. V;....TRESPASS, 1;....See SUPRA, 30, 31, 36.

L A W S .

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- j. MERCHANTS.
- k. ROADS AND HIGHWAYS.
- l. SALT SPRINGS.
- m. SCHOOL LANDS.
- n. STAY OF EXECUTION.

I. CONSTRUCTION.

1. It is a maxim of law, that a statute imposing a penalty for a newly created offense, or for a breach of duty, and defining the particular mode in which, and before what tribunal the penalty shall be recoverable, must be strictly pursued. *Riddick v. Governor*, i. 147.

2. Where the intent of the Legislature is plain, adverse contemporaneous construction is entitled to little weight. *Wear v. Bryant*, v. 147. *Tindall v. Johnson*, v. 179,

3. The rule which requires penal statutes to be construed strictly, merely restrains such construction as would increase the penalty. *Ellis v. Whitlock*, x. 781.

II. HOW PROVED.

a. PUBLIC ACTS.

4. An act to provide for the publication and distribution of the revised laws (R. S. 1825, 493, § 1,) provided that the "following acts of a public, permanent and general nature," &c., should be published—*Held*, that an act incorporating the city of St. Louis, which was included in the list of acts enumerated and published with those acts, was not thereby made a public act. *Loper v. Mayor*, i. 681.

b. PRIVATE ACTS.

5. The statute making the printed statute books of this State, printed under the authority of the State, evidence of the private acts therein contained, (R. S. 1845, 467, § 1,) does not dispense with the requirement of the common law that they must be produced in evidence. *Bailey v. Trustees Lin. Acad.*, xii. 174.

c. FOREIGN LAWS.

6. Foreign laws must be proved as facts, as the court does not take judicial notice of them, and in the absence of foreign laws, the rights of parties will be construed according to the laws of this State. *Milly v. Smith*, ii. 36.

7. Books offered in evidence, as the printed statute books of a sister State, must purport to be printed under the authority of such State. (See R. S. 1835, 250, § 2.) *Bright v. White*, viii. 421. *Bright v. Woods*, viii. 428. *Haile v. Hill*, xiii. 612.

8. If the foreign law is unwritten, it may be proved by parol, and it will not be presumed to be in writing; but foreign written laws must be proved by the laws themselves, properly authenticated. *Charlotte v. Chouteau*, xxv. 465.

9. It is the province of the court to instruct the jury as to the meaning and effect of the written foreign law, the construction of which should be the same which is given to it in the jurisdiction where it is in force; and the opinions of text writers, the decisions of the courts, and the evidence of persons skilled in the foreign law, may be resorted to and consulted to enlighten the court in construing and expounding the foreign written law. *Ibid.*

III. VALIDITY, AND HEREIN OF THE MODE OF TRYING THEIR CONSTITUTIONALITY.

10. The courts of this State not only have the power, but it is their duty, to decide on the constitutionality of the laws passed by the legislature, whenever they are supposed to conflict with the constitution of the United States or of this State. *Baily v. Gentry*, i. 164.

11. The fact that the representatives of a county sanctioned a local act applicable to that county, cannot affect its constitutionality. *Hamilton v. St. Louis County Court*, xv. 3.

12. The constitutionality of a law cannot be inquired into in a collateral proceeding. *The State v. Rich*, xx. 393. *The State v. Leonard*, xxii. 449. *The State v. York*, xxii. 462.

13. The constitution provides that no new county shall be established by which the population of an old county shall be reduced below the legal rate of representation. On motion to quash an indictment, found in a new county, the circuit attorney admitted that such was the effect of establishing said new county—*Held*, that no law could be judicially declared unconstitutional, on the admission by the circuit attorney, in a judicial proceeding of a fact on which its unconstitutionality depends. *The State v. Rich*, xx. 393.

14. The validity of an enrolled statute authenticated, under the statute (R. S. 1845, 694, § 1,) by the certificate of the presiding officers of the two houses, that it passed over the governor's veto by the constitutional majority, cannot be impeached by the journals showing a departure from the forms prescribed by the constitution in the re-consideration of the bill. *Pacific Railroad v. Governor*, xxiii. 353.

IV. IGNORANCE NO EXCUSE FOR NON-COMPLIANCE WITH.

15. Ignorance of the law is no excuse for a failure to comply with its requirements. *White v. Collier*, v. 82.

V. LEGISLATIVE POWER.

16. The organic law of the territory of Missouri (1 Ter. L., 9, § 4,) having conferred on the territorial legislature "power to make laws in all cases, both civil and criminal, for the good government of the people of said territory, not repugnant to, or inconsistent with the constitution and laws of the United States," the territorial legislature possessed power to incorporate towns. *Riddick v. Amelin*, i. 5.

17. And also power to incorporate a bank. *Douglass v. Bank of Missouri*, i. 24.

18. The legislature has constitutional authority to incorporate towns and cities with power to legislate in regard to subjects of local police. *The State v. Simonds*, iii. 414.

19. Where, by an act of the legislature, commissioners are appointed to locate a county seat and erect buildings on a lot of not less than fifty acres, and the commissioners make the location and cause the buildings to be erected on a lot of only forty acres, and the legislature by a subsequent act ratify and confirm the action of the commissioners, such subsequent act is constitutional and impairs no private right acquired under the first act. *Ruggles v. Washington County*, iii. 496.

VI. LAWS DECLARED CONSTITUTIONAL.

a. ASSAULT AND BATTERY.

20. The act of January 18, 1831, (2 Ter. L., 271,) declaring assaults, &c., offenses not indictable, and making such offenses punishable before a Justice in a summary way, is constitutional. [*The State v. Stein*, ii. 67, commented upon.] *The State v. Ledford*, iii. 102.

b. ATTORNEYS.

21. The statute imposing a tax upon lawyers (Acts 1846-7, 123) is constitutional. The license granted to attorneys under that statute, is not a contract,

which vests a right, but the grant of a privilege, which may be revoked, or new conditions may be imposed upon its enjoyment. *Simmons v. The State*, xii. 268.

C. BOATS AND VESSELS.

22. The statute relating to boats and vessels, (R. S. 1845, 180,) in its application to boats owned in other States, is not in conflict with the constitution of the United States, or the principles of inter-state comity. *Yore v. St. Bt. C. Bealer*, xxvi. 426.

D. CONDEMNATION OF LAND TO PUBLIC USE.

23. The statute which provides that, in assessing the damages sustained by a person by reason of a road passing over his land, "the commissioners shall take into consideration the advantages as well as the disadvantages of the road to such person," (R. S. 1845, 974, § 17,) is constitutional. *Newby v. Platte County*, xxv. 258.

24. And the statute, containing a like provision, which authorizes the formation of associations to construct plank roads, (Acts 1850-1, 261, § 8,) is constitutional, and in authorizing the appointment of a jury of five disinterested land-owners of the county to assess the damages, &c. *Louisiana and Frankford Plank Road Co. v. Pickett*, xxv. 535.

25. The building of a railroad by a private corporation, under the authority of the legislature, for the accommodation of the public, is a public use for which private property may be lawfully taken. *Walther v. Warner*, xxv. 277.

26. It is competent for the legislature to authorize entries upon private property without compensation, for the purpose of making examinations and surveys preliminary to the location of a railroad. *Ibid.*

27. It is competent for the legislature to provide that, in determining the just compensation to which the owner of property appropriated to public use is entitled under the constitution, (Art. XIII, § 7,) the benefits and advantages accruing to such owner in respect to the residue of his property unappropriated, in consequence of the use to which the part taken is applied, shall be taken into consideration. *Scott, J., dis. Newby v. Platte County*, xxv. 258.

28. This right is based upon the general taxing power, and such a provision is in effect an assessment or tax on benefits; being such, and not a tax on property, it is not in conflict with that provision of the constitution which requires "that all property subject to taxation in this State shall be taxed in proportion to its value." (Art. XIII, § 19.) *Ibid.*

29. *Quære*, whether it would be competent for the legislature, in providing a mode for the condemnation and appropriation of private property to public uses, to make the judgment of a special tribunal final, and thus place the matter beyond the control of the courts. *North Missouri R. R. Co. v. Lackland*, xxv. 515. *Same v. Reynal*, xxv. 534.

E. CONFESSION OF JUDGMENT.

30. Section 14 of the act of 1820, (1 Ter. L., 685,) giving the Clerk of the Circuit Court power to enter up judgments by confession, is constitutional. *Finley v. Caldwell*, i. 512. *Russell v. Geyer*, iv. 384.

f. CONTESTED ELECTION.

31. The provision in the statute relating to clerks, that "if there be a tie or contested election, it shall be determined by the court to which the office belongs," (R. S. 1845, 201, § 8,) is constitutional. (See R. S. 1835, 34, § 3.) *Lewis v. The State*, xii. 128.

g. COLLECTOR.

32. Where a judgment was recovered to the use of a county against a collector of taxes, who failed to pay the same into the county treasury, it was held, that the legislature had authority to pass an act releasing the collector; and that such an act did not impair the obligation of a contract. *Conner v. Bent*, i. 235.

h. COSTS.

33. The statute relating to the payment of jurors in St. Louis County, (Acts 1846-7, 68,) which requires that a jury fee shall be taxed as part of the costs of every judgment rendered against a defendant in a criminal proceeding, is constitutional. (See Const. Mo., Art. XIII, §§ 8, 9.) *The State v. Wright*, xiii. 243.

i. COUNTY.

34. It seems that a clause in a law establishing a new county, requiring it to be submitted to a vote of the people who are to bear the consequent burdens might not be held unconstitutional. *The State v. Scott*, xvii. 521.

See SUPRA 19.

j. DRAMSHOP.

35. The statute restricting the County Court of St. Louis county in granting dram-shop licenses, to persons who have resided two years in the State and three months in the county, (R. S. 1845, 1099,) is not in conflict with the Constitution of the United States. (Art. IV, § 2.) *Austin v. The State*, x. 591.

36. The legislature has power under the constitution, to pass a law prohibiting the sale of liquor without a license. *The State v. Searcy*, xx. 489.

k. EJECTMENT.

37. The statute, (R. S. 1845, 440, § 2,) which authorizes an action of ejectment to be maintained on a New Madrid location is constitutional. *Gray v. Givens*, xxvi. 291.

l. EXEMPTION FROM JURY DUTY.

38. The act incorporating the "Central Fire Co.," of St. Louis, exempting certain persons from serving on juries, is constitutional. (Acts 1836-7, 172, § 4.) *McGunnegle v. The State*, vi. 367.

m. LARCENY.

39. The statute, (R. S. 1845, 868, § 6,) which authorizes the trial of a person guilty of larceny in this State, committed on board of a vessel in the course of a voyage, is constitutional. *Steerman v. The State*, x. 503.

40. The legislature had power to enact the statute, (R. S. 1845, 408, § 3,) which punishes for larceny any person who steals property in another State or county, and brings the same into this State. *Hemmaker v. The State*, xii. 453.

D. LOTTERY.

41. The act of December 19, 1842, "to abolish lotteries," (Acts 1842-3, 85,) is constitutional. Where the legislature authorizes a private individual, or a corporation, to raise a sum of money by lottery, the statute by which the authority is created may be, at any time, repealed without violating the constitution. *Freleigh v. The State*, viii. 606.

O. MERCHANTS.

42. The act of 1825 imposing a tax on vendors of merchandise and peddlers, (R. S. 1825, 531,) and the supplementary act of 1829, (2 Ter. L. 172,) are not repugnant to the constitution of the United States, (Art. I, §§ 8, 10,) in their application to the sale of merchandise not in the original packages. *Tracy v. The State*, iii. 3.

P. PAVING STREETS.

43. The tenth section of the act incorporating the town of Palmyra, (Acts 1844-5, 155,) which gives the trustees power, if the owner or occupant of lots adjacent to the streets of said town should fail to pave the same as directed by ordinance, to pave them and recover the full expense thereof from such owner or occupier, is constitutional. *Inhabitants of Palmyra v. Morton*, xxv. 593.

Q. RAILROADS.

44. Section 12 of the act to authorize the formation of railroad associations, &c., (Acts 1852-3, 128,) is constitutional in its application to companies previously created. *Peters v. St. Louis and Iron Mountain R. R. Co.*, xxiii. 107.

45. The legislature did not impair the obligation of a contract, (Const. U. S., Art. I, § 10,) in the passage of the act, (Acts 1852-3, 143, § 51,) requiring railroad companies to fence their roads, &c., or to respond in damages for all injuries arising from a failure so to do, although their charters contained no reservation of such power. *Gorman v. Pacific Railroad*, xxvi. 441.

I. RECOGNIZANCE.

46. The legislature are not prohibited from authorizing the mayor of St. Charles to take recognizances in criminal cases. (See Acts 1848-9, 266.) *Cunningham v. The State*, xiv. 402.

S. SALARY OF JUDGES.

47. The act to increase the salaries of the judges in St. Louis county, of March 3, 1851, (Acts 1850-1, 281,) does not leave the additional amount of compensation to the discretion of the County Court, nor is the act unconstitutional. *Hamilton v. St. Louis County Court*, xv. 3.

t. SCHOOL LANDS.

48. The act of 1831, providing for the sale of township school lands, (2 Ter. L. 261,) is not repugnant to the nature of the grant of said lands from the United States, (3 U. S. Stat. 547, § 6,) nor does it conflict with the constitution of Missouri; and a purchaser of such lands, under the provisions of that act, acquires a valid title. WASH, J., *dis. Maupin v. Parker*, iii. 310. *Payne v. St. Louis County*, viii. 473.

u. ST. LOUIS.

aa. Charter.

49. The act of 1841 altering the charter and extending the limits of the city of St. Louis, (Acts 1840-1, 129,) being accepted by a majority of the citizens of St. Louis, is constitutional, although such extension were against the consent of those included within the new limits. *City of St. Louis v. Russell*, ix. 503. *Same v. Allen*, xiii. 400.

bb. Quarantine Laws.

50. The act of the legislature authorizing the city of St. Louis to make regulations to prevent the introduction of contagious diseases into the city, (Acts 1842-3, 116, § 2,) is not a delegation of legislative power, and ordinances made in pursuance of such authority are not in contravention of the constitution of Missouri, (Art. III, § 1.) *Metcalf v. City of St. Louis*, xi. 102.

51. So the ordinance of the city of St. Louis which prescribes that boats coming from below Memphis, having had on board, at any time during the voyage, more than a specified number of passengers, shall remain in quarantine not less than forty-eight hours, nor more than twenty days, is not repugnant to that clause in the constitution of the United States which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," (Art. I, § 8, cl. 3.) *City of St. Louis v. McCoy*, xviii. 238. *Same v. Boffinger*, xix. 13.

cc. Condemnation of Land to Public Use.

52. Section 2 of the charter of the city of St. Louis, (Rev. Ord. 1856, 157,) relating to the opening of streets, &c., and the payments for lands taken for that purpose, is constitutional, and assessments against adjacent owners in respect to the benefits received by them from the opening, widening or altering a street, &c., are a constitutional exercise of the taxing power. *Garrett v. City of St. Louis*, xxv. 505.

v. SUNDAY.

53. The statute compelling the observance of Sunday, (R. S. 1845, 404, §§ 31-34,) is constitutional. *The State v. Ambs*, xx. 214.

w. TAXES.

54. The act of February 27, 1855, (Acts 1854-5, 73,) incorporating the Egyptian Levee Co., for the purpose of reclaiming a certain district from inunda-

tion by leveeing, ditching and embanking, which authorizes said company to levy a tax per acre on the land owners within said district, is not in conflict with the provision of the constitution which requires that all property subject to taxation shall be taxed in proportion to its value. *Egyptian Levee Co., v. Hardin*, xxvii. 495.

X. TOWNS.

55. The act of 1845 relating to the incorporation of towns by the County Court, (R. S. 1845, 1047,) is constitutional. The duties imposed on the court are judicial and not legislative in their nature. *Kayser v. Trustees of Bremen*, xvi. 88.

Y. TRIAL BY REFEREES.

56. Art. XVI of the practice act of 1849, authorizing a reference of issues to referees, (Acts 1848-9, 91,) does not infringe the constitutional right of trial by jury, (Art. XIII, § 8.) *Shepard v. Bank of Missouri*, xv. 143.

Z. VOLUNTEERS.

57. The act of 1847, by which suits and processes against volunteers who are absent from the State are suspended until the regiment returned, (Acts 1846-7, 109,) is constitutional. *Edmonson v. Ferguson*, xi. 344. *Lindsey v. Burbridge*, xi. 545.

(a.) WAY.

58. The act of 1845, (R. S. 1845, 1074,) only provides a mode for locating a right of way already existing, and is constitutional. *Snyder v. Warford*, xi. 513.

VII. LAWS DECLARED UNCONSTITUTIONAL.

a. APPEAL.

59. The appellate jurisdiction of the Supreme Court having been conferred by the constitution of this State without limit, (Art. V, § 2,) the legislature have no power to pass a law confining appeals and writs of error to cases where the amount is one hundred dollars or upwards. (1 Ter. L. 718, § 5.) *Graves v. Black*, i. 221. *Blunt v. Sheppard*, i. 219.

b. ASSAULT AND BATTERY.

60. The act of February 19, 1825, (R. S. 1825, 139,) gave Justices of the Peace jurisdiction in cases of assault, battery, affray, &c., and authorized them to proceed in a summary manner, without indictment by a grand jury, such offenses being at that time indictable—*Held*, that the law giving such jurisdiction to Justices is in violation of that clause of the constitution of this State which declares "that the accused cannot be deprived of life, liberty or property but by the judgment of his peers or the law of the land." (Art. XIII, § 9.) *The State v. Stein*, ii. 67.

C. CONDEMNATION OF LAND TO PUBLIC USE.

61. Legislative acts authorizing the taking of private property for public use, are unconstitutional unless they provide the owner with a proper remedy to obtain a just compensation. This remedy must be an efficient one; there must be an adequate fund and an appropriate legal remedy to enforce its application; a judgment against a private corporation is not sufficient. *Walther v. Warner*, xxv. 277.

62. The "act to establish a neighborhood road in Washington county," (Acts 1855, 466,) is unconstitutional. Private property cannot be condemned and appropriated by the Legislature to private use. *Dickey v. Tennison*, xxvii. 373.

d. COUNTERFEITING.

63. The act of 1825, (R. S. 1825, 292, § 43,) which provides for the punishment of counterfeiting current coin, is unconstitutional and void, as the power to legislate on that subject is, by the constitution of the United States, (Art. I, § 8,) vested exclusively in Congress. *WASH, J., dis. Mattison v. The State*, iii. 421.

e. COUNTY.

64. Under the amendments to the State constitution, ratified in 1849, (Acts 1848-9, 6, § 1,) a law establishing a new county, by which an old one was reduced below the ratio of representation, was held unconstitutional, notwithstanding a proviso that, for the purposes of representation, the inhabitants of the new county should continue to vote as in the old one, until the population of the new county should entitle it to a representative. *The State v. Scott*, xvii. 521.

f. DIVORCE.

65. The act of February 11, 1833, (Sess. Acts 1832-3, 131, § 25,) granting a divorce of the parties therein named from the bonds of matrimony, is an exercise of judicial power, and is therefore unconstitutional and void, and, *Per M'GIRK, J.*, impairs the obligation of a contract. *The State v. Fry*, iv. 120. *Bryson v. Campbell*, xii. 498. *Bryson v. Bryson*, xvii. 590.

g. DRAMSHOP.

66. The act of 1857, (Acts 1856-7, 60,) releasing all persons from prosecution then indicted for violations of the act to regulate dramshops committed before December 15, 1856, upon the conditions therein stated, is unconstitutional as an exercise of the pardoning power, and as an interference with the judicial department of the government. *The State v. Sloss*, xxv. 291. *The State v. Todd*, xxvi. 175.

h. LOAN OFFICE CERTIFICATES.

67. Loan office certificates, issued under the Act of the General Assembly of June 27, 1821, "for the establishment of Loan Offices," (1 Ter. L. 760,) are bills of credit within the meaning of that part of Art. I, § 10, of the Constitution of the United States, which declares that no State shall "emit bills of credit;" but

a borrower of those certificates will not be permitted to set up the unconstitutionality of their emission as a defense to an action brought by the State to recover the amount borrowed. *Mansker v. The State*, i. 452. *The State v. Craig*, i. 502. *The State v. Watson*, i. 502. *The State v. Davis*, i. 502. [CONTRA—See *Craig v. The State of Missouri*, 4 Peters, 431, where it is held that the unconstitutionality of their emission may be set up as a defense.]

68. And the loaning of them to individuals, under mortgage, is not the act of emission prohibited by that Constitution. *Loper v. The State*, i. 632. *Thomas v. Starling*, i. 696. *The State v. Byrne*, i. 748. *The State v. Evans*, i. 748. *The State v. Ravenscroft*, i. 748.

i. LOTTERY.

69. The act of February 26, 1835, (2 Ter. L. 475,) supplementary to the act of February 9, 1833, (2 Ter. L. 374,) "to authorize a sum of money to be raised by lottery, to be given to the Sisters of Charity in the city of St. Louis," authorizes the commissioners to sell the lottery; and, after a sale, the legislature can pass no law impairing the obligation of the contract of sale. *The State v. Hawthorn*, ix. 385.

70. The commissioners having sold the lottery, the act of December 19, 1842, (Acts 1842-3, 85,) prohibiting the sale of lottery tickets in this State, is unconstitutional as to the vendee; and his right to sell, under the purchase made in accordance with the act of 1835, is not affected by the act of 1842. *Ibid.*

j. MERCHANTS.

71. By the statute, (R. S. 1845, 739, § 10,) the collector was authorized to collect, as an *ad valorem* tax, such a per cent. upon merchandise offered for sale as for the time being might be assessed upon real estate. By an act of 1849, (Acts 1848-9, 68,) purporting to be "in lieu" of former enactments for taxing merchants, a tax in the form of a charge for a license was authorized, of so much on the first \$500 worth of merchandise offered for sale, and twenty cents for each additional \$100, with a proviso that this act should not be construed to repeal § 10 of the act of March, 1845, relating to the *ad valorem* tax—*Held*, that this saving clause was repugnant to the Constitution of Missouri. (Art. XIII, § 19.) *NAPTON, J., dis. Crow v. The State*, xiv. 237.

72. The statute, (R. S. 1855, 1072,) so far as it requires merchants dealing in the manufactures of other States to take out a license and pay a tax for the sale of such goods, is unconstitutional. *NAPTON, J., dis. The State v. North*, xxvii. 464.

k. ROADS AND HIGHWAYS.

73. The thirty-third section of the act of March 3, 1851, relating to roads, (Acts 1850-1, 280,) is unconstitutional and void; for in a general law, affecting private rights, which takes effect by its terms, a clause authorizing the county courts to suspend it at pleasure in their several counties, is unconstitutional and void, and may be stricken out of the act. *The State v. Field*, xvii. 529.

I. SALT SPRINGS.

74. Where a lease is made by the proper officer of one of the salt springs of the State, under a law which provided for no extraordinary remedy for the non-payment of the rent, (1 Ter. L. 981)—*Held*, that the State cannot afterwards give an extraordinary and summary remedy by distress, (R. S. 1825, 702, § 7,) against such tenant. It would be an interference with the 8th section of the XIIIth article of the Constitution of this State, which provides "that the right of trial by jury shall remain inviolate." *Craig v. Barcroft*, i. 656.

III. SCHOOL LANDS.

75. A. purchased certain school lands in the county of Chariton, and executed bonds for the purchase money to the county, for the benefit of the inhabitants of the township in which the land was situated. The legislature passed an act requiring the County Court to make an order rescinding the contract of sale, and to cancel the bond for the purchase money—*Held*, that the act is unconstitutional, and that the inhabitants of the township are entitled to the accrued interest upon the bond. *Butler v. Chariton County Court*, xiii. 112.

II. STAY OF EXECUTION.

76. The act of December 28, 1821, (1 Ter. L. 818, §§ 2, 3,) by which it was provided that execution should be stayed for two and a half years, unless the plaintiff endorsed thereon his consent to receive property at two thirds its appraised value, was in violation of the Constitution of the United States and of this State, in that it impaired the obligation of contracts, made property a legal tender, and denied justice. *Baily v. Gentry*, i. 164.

77. So the act directing a stay of execution on judgments obtained before a Justice of the Peace, (R. S. 1825, 482, § 26,) is repugnant to the Constitution both of the United States and the State of Missouri, and therefore void. *Bumgardner v. Howard Circuit Court*, iv. 50.

LEGISLATURE.

I. COMPENSATION OF MEMBERS.

1. Where the legislature at a regular session adjourned for a period of several months, to give the committee on revision of the statutes time to discharge their duties, and the members dispersed to their homes, a member is not, under the statute, (R. S. 1845, 713,) entitled to compensation during the vacation or period of adjournment. *Morgan v. Buffington*, xxi. 549.

2. It is not within the power of the legislature to restrain the auditor of accounts of the State from an examination of vouchers presented to him, to see whether they are correct, though the vouchers be duly formal. *Ibid*.

3. So under the statute, (R. S. 1845, 714, § 4,) a certificate from the Speaker of the House of Representatives, to the effect that a certain sum is due a member of the legislature for his services as such, is not conclusive upon the auditor. He has a right to examine whether it is correct. *Ibid.*

LIBEL AND SLANDER.

- I. ACTIONABLE WORDS.
- II. PARTIES TO ACTION.
- III. PLEADING.
- IV. EVIDENCE.
- V. JUSTIFICATION.
- VI. CHARACTER.
- VII. DAMAGES.

I. ACTIONABLE WORDS.

1. Words which are actionable, in and of themselves, import malice; and, if proved, the malice is implied. *Estes v. Antrobus*, i. 197.

2. An oath administered by a Justice before arbitrators on a parol submission, not made a rule of court, is not judicial, (See R. S. 1825, 137, § 1—604, § 3,) nor will false swearing under it constitute perjury. Therefore to charge a party with having sworn falsely, under such circumstances, is not actionable. *Mahan v. Berry*, v. 21. [But see *Bridgman v. Bridgman*, xxiii. 272.]

3. To publish falsely and maliciously of a woman that she had a child, with the intention of charging her with having been guilty of fornication, is actionable under the statute, (R. S. 1835, 581.) *Möberly v. Preston*, viii. 462.

4. It is libelous to write of a person that "he is thought no more of than a horse-thief or counterfeiter." [Distinction drawn between written and verbal slander.] *Nelson v. Musgrave*, x. 648.

5. A plea of justification in such a case must aver that the plaintiff had committed the offenses of horse-stealing and counterfeiting. It is not sufficient to aver that he "was thought no more of than a horse-thief," &c. *Ibid.*

6. The editors of a newspaper, speaking of a steamboat agent, called him an impertinent person, and charged him with withholding newspapers which had been entrusted to him for their paper, and warned their friends against sending them any more favors by him—*Held*, to be libelous. *Keemle v. Sass*, xii. 499.

7. In actions of slander, the words spoken are to be construed according to their natural meaning and common acceptance. The doctrine that words spoken slanderously are to be taken in their mildest sense, has long since been abandoned. *Fallenstein v. Boothe*, xiii. 427.

8. Words which involve a charge of adultery are actionable, by statute, (R. S. 1845, 1011, § 1,) without alleging special damage. *Stieber v. Wensel*, xix. 513.

9. The words, "You swore to a lie before the grand jury," are actionable, and need no colloquium or inducement. *Perselly v. Bacon*, xx. 330.

10. Words charging a woman with being a "whore" are actionable, *per se*. *Hudson v. Garner*, xxii. 423.

11. Words charging a person with stealing in another State are actionable, *per se*. *Johnson v. Dicken*, xxv. 580.

12. Slandorous words, charging a man with having whipped his wife, are not actionable, *per se*. *Birch v. Benton*, xxvi. 153.

13. Nor are words charging that a man had whipped his mother. *Speaker v. McKenzie*, xxvi. 255.

14. Words imputing an indictable offense, for which corporal punishment may be inflicted as the immediate punishment, and not as the consequence of a failure to satisfy a pecuniary penalty, are actionable in themselves. *Per* RICHARDSON, J. *Birch v. Benton*, xxvi. 153.

II. PARTIES TO ACTION.

15. Where, in an action of slander, grounded on a charge of adultery, the plaintiff sued as an infant by her next friend, it was *held* that an unmarried woman was incapable of committing the offense, and that if the plaintiff were married she could not sue by her next friend, but must be joined with her husband. *Adams v. Hannon*, iii. 222.

16. In a suit for slanderous words spoken of the wife, she should be joined with her husband as a party to the suit; the husband alone cannot recover, unless he avers and proves special damages. *Johnson v. Dicken*, xxv. 580.

III. PLEADING.

17. To say of a woman that "she has gone down the river with two whores to a goosheorn, and is now there with them," is not actionable without a *colloquium*, as to the kind of house or place alluded to; and, *quære*, whether they are actionable with such *colloquium*. *Dyer v. Morris*, iv. 214.

18. The meaning of the word "goosheorn" should be averred, and also that the hearers understood it as averred. *Per* M'GIRK, J. *Ibid*.

19. Where the slander imputed was in relation to the crime of passing counterfeit money, there must be a *colloquium* in the declaration, averring that the defendant spoke the words of and concerning his commission of the offense, knowing the money to be counterfeit; and the want of such an averment is not aided by the *inuendo*. *Church v. Bridgman*, vi. 190.

20. A declaration in slander, where the words spoken charged the plaintiff with swearing to a lie as a witness in a proceeding before a Justice, in which it is not stated that the Justice had jurisdiction or power to administer the oath,

or that the testimony was given upon a material matter, although bad on demurrer is good after verdict. *Palmer v. Hunter*, viii. 512. *Harris v. Woody*, ix. 112.

21. A count in slander, stating the actionable words to be that plaintiff "swore to a lie," with an averment that defendant meant thereby, and was so understood, to charge the plaintiff with the crime of perjury, but without any *colloquium*, is bad. *Palmer v. Hunter*, viii. 512.

22. Because lexicographers refrain from publishing obscene words, or from giving the obscene signification to words that may be used without conveying an impure idea, it does not follow that they are not English words, and not understood by those who hear them, or that chaste words may not be applied so as to be understood in an obscene sense. [*Adams v. Hannon*, iii. 222, *OVERRULED*.] *Edgar v. McCutchen*, ix. 759.

23. Under the new code, (Acts 1848-9, 82, § 10,) in an action of libel and slander, a petition is sufficient which states that the defamatory matter was published or spoken of the plaintiff, without stating any extrinsic facts for the purpose of showing its application. *Steiber v. Wensel*, xix. 513.

24. An inuendo in the petition, that the defendant intended by such words to charge the plaintiff with adultery, being unnecessary, may be rejected. *Hudson v. Garner*, xxii. 423.

25. Where slanderous words are spoken falsely of another, it is unnecessary to aver or prove express malice. *Ibid*.

26. The office of an inuendo is to explain the meaning of the defendant in using the slanderous words; and this meaning, as averred by an inuendo, is a question of fact for the jury. *Birch v. Benton*, xxvi. 153.

27. It is too late, after verdict in an action for slander, to object to the insufficiency of the justification set forth in the answer. *Evans v. Franklin*, xxvi. 252.

See PLEADING, 88-90.

IV. EVIDENCE.

28. In an action of slander, an allegation that defendant said, "A. took, or stole a sufficient quantity of corn to feed two horses, out of my crib,—he is a thief," is satisfied by proof that defendant said, "A. had come to the house of defendant, and took his, the defendant's, corn out of his crib, and fed his horses of nights, and would not open his bells, until he, the defendant, had gone to bed." *Estes v. Antrobus*, i. 197.

29. Evidence that the same words, charged to have been spoken by defendant were spoken by others, and that the charge was a current report, is not admissible in mitigation of damages in an action of slander. *Anthony v. Stevens*, i. 254.

30. Nor is evidence that some person told the witness that plaintiff had done the act charged on him by defendant. *Ibid*.

31. In an action for slanderous words, the words constituting the slanderous charge must be set out, and proved as laid. *Watson v. Musick*, ii. 29.

32. The sense and manner of speaking the words charged as slanderous, must agree in proof with the averments of the declaration, as well as the substance of the words themselves, and a variance therein is fatal; but the proof of more words than are laid in the declaration is no variance, provided the context of the words proved, agrees in sense with the words alleged. *Cooper v. Marlow*, iii. 188.

33. And it is not sufficient that they express an equivalent meaning. *Berry v. Dryden*, vii. 324. *Birch v. Benton*, xxvi. 153.

34. And the question of variance is for the court to determine. *Ibid.*

35. Proof of words spoken in the third person will not support an allegation in a declaration of words spoken in the second person, and so *vice versa*. *Williams v. Harrison*, iii. 411.

36. In an action of slander for charging plaintiff with having been guilty of fornication, evidence that there was a common report in circulation concerning the guilt of the plaintiff, is inadmissible. Neither can the defendant prove that a third person told him of the report before the time he was charged with speaking the words. *Moberly v. Preston*, viii. 462.

37. In an action for slander, the defendant, under the plea of not guilty, may prove that the publication of the words set forth in the declaration, was procured by the fraudulent contrivance of the plaintiff, with a view to an action. *Sutton v. Smith*, xiii. 120.

38. In an action of slander, where the charge against the plaintiff was for stealing a dollar from one person, evidence that he stole that sum from another is not admissible. *Self v. Gardner*, xv. 480.

V. JUSTIFICATION.

39. A plea of justification which alleges that the slanderous words charged in the declaration were spoken on the authority of a third person, and that at the time of the speaking the name of the author was given is sufficient. *Church v. Bridgman*, vi. 190.

40. But to sustain such plea it must be shown that the words were spoken by the person whose name was given as the author. *Ibid.*

41. A plea of justification in slander, that defendant being asked by one B. of and concerning the words spoken and published, answered and declared that he had heard and been told the same by one S., is bad. *Moberly v. Preston*, viii. 462.

42. In a plea of justification in slander, that the words were communicated to defendant by a third person, and that he gave the name of his author at the time of speaking the words, the defendant should give a cause of action against such third person, by showing that he spoke the words falsely and maliciously, and that defendant believed what he heard, and repeated the words on a justifiable occasion. *Ibid.* (See 21 Com. Law Rep., 71.)

See *INFRA*, 43; . . . *SUPRA*, 5, 27, 29, 30, 36, 37.

VI. CHARACTER.

43. Where a party institutes an action of slander, he puts his general character in issue as to the crime or charge imputed to him by defendant; and evidence on that point may be given by the defendant in mitigation of damages. *Anthony v. Stephens*, i. 254.

44. Where the witness swore that he had not known the party's character impeached, except in the particular trial, it is the right of the adverse party to inquire of him if he had not known it to be impeached in other cases. *Martin v. Miller*, iv. 47.

See *INFRA*, 46.

VII. DAMAGES.

45. The repetition of slanderous words, after suit commenced, may be shown in aggravation of damages. *Williams v. Harrison*, iii. 411.

46. It is for the jury to estimate the value of character, and to assess the damages for any injury thereto; and this court will not interfere with their verdict, except in a case of gross and manifest wrong. *Fallenstein v. Boothe*, xiii. 427.

47. Where, in a suit for slander, slanderous words against the plaintiff, and also against the plaintiff's wife, who is not a party to the suit, are charged, and evidence is received upon both charges, and the jury assess entire damages, it will be presumed that some part of the damages was assessed upon the count for words spoken against the wife, although this count was defective, and the judgment will be reversed. *Johnson v. Dicken*, xxv. 580. See *SUPRA*, 43.

See *COSTS*, 34;....*CRIMINAL LAW*, 346;....*LIMITATIONS*, 10.

LIEN.

I. VENDOR'S LIEN.

- a. PREVAILS OVER SALES.
- b. ENFORCEMENT.
- c. WAIVER.

II. SUBSTITUTION.

III. PRIORITY.

I. VENDOR'S LIEN.

a. PREVAILS OVER SALES.

1. The vendor of real estate has an equitable lien on the estate sold for the purchase money remaining unpaid against subsequent purchasers with notice. *McKnight v. Bright*, ii. 110. *Marsh v. Turner*, iv. 253.

2. A. sold to B. and C. a tract of land, and executed a deed acknowledging payment of the purchase money. Below the deed and before the certificate of acknowledgment there was a memorandum, purporting to be the act of both, but signed by B. alone, stating that one of the payments was still due, and that the land was bound for it. Before this deed was recorded, B. and C. sold and conveyed the land to D.—*Held*, that the memorandum at the foot of the deed was sufficient to charge D., the subsequent purchaser, with notice of the lien. *Scott v. McCulloch*, xiii. 13.

3. A. purchased at an administration sale of the property of B. a tract of land subject to the lien of C. as vendor for the purchase money—*Held*, in a suit by C. against A. to enforce the lien, in which it was decreed that the land be sold and the proceeds applied to the payment of the unpaid purchase money, that it was erroneous to decree that out of such proceeds A. should first be paid the amount paid by him at the administration sale. *Delassus v. Poston*, xxi. 543.

b. ENFORCEMENT.

4. A., having purchased a tract of land, got a bond for title on payment of the purchase money. He then sold his right, and transferred the bond to B. The purchase money being unpaid, the lien of the vendor cannot be enforced by a suit *in personam* against A., nor can any interest in the land be sold under an execution in such suit. The rights of the parties cannot be adjusted without a resort to a court of equity. *Broadwell v. Yantis*, x. 398.

5. The fact that the vendor had the notes for the purchase money allowed against the estate of the vendee after his death, does not affect their right to resort to the land for payment of the balance of the purchase money. *Delassus v. Poston*, xix. 425.

6. Nor that the vendors, having the legal title, requested the administrator of the vendee to procure a sale of the vendee's interest in the land, it being an equitable interest, where such land was bought at the administration sale, with notice of the lien. *Ibid*.

7. Where a vendor of land, under a judgment for the purchase money, levies upon the interest of the vendee, and purchases in the same at the sale, he will stand just where he stood before the sale; the vendee is still entitled to a conveyance upon the payment of the purchase money. *Lumley v. Robinson*, xxvi. 364.

8. But to entitle the vendee, in such case, to a decree of title, his petition must contain an offer to pay the purchase money due. *Ibid*.

c. WAIVER.

9. As to the vendor's lien for the purchase money of land, and what is or is not a waiver of it. *Delassus v. Poston*, xix. 425.

II. SUBSTITUTION.

10. A party cannot acquire a lien upon land purchased by another, by the voluntary and unauthorized payment of the purchase money for such land. *Truesdell v. Callaway*, vi. 605.

III. PRIORITY.

11. The proceeds of land sold by the sheriff, under two executions, both of which were issued on the same day, and placed in the hands of the sheriff at the same time, must be appropriated to the satisfaction of the eldest judgment first; and a judgment obtained on the first day is older than a judgment obtained on the second day of the same term. (R. S. 1835, 339, §§ 3-5—256, § 19.)

Friar v. Ray, v. 510.

12. Though judgments take effect as liens upon land in St. Louis County only from the time an abstract is entered in the Land Court, yet, under the statute, (R. S. 1845, 622, § 3,) when rendered by the same court at the same term, there can be no priority among several judgments. *Dunscomb v. Maddox*, xxi. 144.

13. A lien upon real estate attaches from the time of filing a transcript of a judgment rendered by a Justice, in the Circuit Court, and will prevail against a deed filed for record at a later hour of the same day. *Jones v. Luck*, vii. 551.

14. A judgment obtained after a mortgage was executed, but before it was recorded, will prevail against such mortgage, and the purchaser at the execution sale, will hold against the mortgagee, although he had notice of the mortgage at the time of the sale. *Hill v. Paul*, viii. 479. *Reed v. Austin*, ix. 713. *Frothingham v. Stacker*, xi. 77.

15. But, under the R. S. of 1845, a *bona fide* purchaser, who has failed to record his deed until after a judgment is obtained against his vendor, but who causes it to be recorded prior to the execution sale, will hold against the purchaser at such sale. *Davis v. Ownsby*, xiv. 170. *Valentine v. Havener*, xx. 133, Scott, J., *dis.*

16. A debtor executed and delivered for record a deed of trust, conveying certain property to secure a specified debt. On the same day the sheriff, by virtue of an attachment, took possession of the same property—*Held*, in a controversy between the attaching creditor and the trustee, that in the absence of any evidence upon the point, the possession of the sheriff is *prima facie* evidence that he seized the property at an earlier hour of the day than the deed of trust was delivered for record. *Pearce v. Dansforth*, xiii. 360.

17. A. held a bond against B. bearing six per cent. interest, secured by a lien on two slaves. Afterwards, one of the slaves having died, for the purpose of better securing his debt, and without any intention of abandoning his lien on the surviving slave, A. took a new bond from B. for the amount of the debt and interest then due, bearing ten per cent. interest, upon which C. was surety, and discharged the former bond—*Held*, that A. did not thereby abandon his lien on the slave, but that the lien only extended to the amount of the first bond, with six per cent. interest. *McDonald v. Hulse*, xvi. 503.

18. By virtue of an execution from a State Court, land, then subject to the lien of a judgment of the United States Circuit Court, was sold to A. After the lien of the latter judgment expired, execution issued thereon, by virtue of which the same land was sold to B.—*Held*, that A. was entitled to the land. *Chouteau v. Nuckolls*, xx. 442. See SCHOOLS, 5.

See ADMINISTRATION, 94 ;.... AGENCY, 45, 46 ;.... ATTACHMENT, X ;.... AUCTIONEERS, III ;.... BOATS AND VESSELS, I ;.... EXECUTION, VII ; GARNISHMENT, 19 ;.... JUDGMENT, V ;.... LANDLORD AND TENANT, IV ;.... MECHANICS' LIEN.

LIMITATIONS.

I. CONSTRUCTION OF STATUTE.

II. WHEN AND UNDER WHAT CIRCUMSTANCES IT BEGINS TO RUN.

- a. GENERALLY.
- b. COVENANT.
- c. NOTES AND BONDS.
- d. AGAINST INHABITANTS OF A TOWN.
- e. SLANDER.
- f. ADMINISTRATORS.
- g. ADVERSE POSSESSION.
- h. EFFECT OF DISABILITIES.
- i. TRUSTS.

III. DOES NOT RUN AGAINST THE STATE.

IV. AGAINST WHOM AVAILABLE.

V. IN WHAT TIME A BAR—PRESUMPTION OF PAYMENT.

VI. EFFECT OF A PROMISE OR ACKNOWLEDGMENT.

VII. PART PAYMENT.

VIII. WHEN ITS OPERATION IS SUSPENDED.

- a. BY ACT OF THE DEFENDANT.
 - aa. Concealment.
 - bb. Absent and Absconding Debtor.
 - cc. Removal from the State where the Contract was made.
- b. OPEN ACCOUNTS.
- c. LEGAL PROCEEDINGS.
- d. COVERTURE.

IX. PLEADING.

X. ADVERSE POSSESSION.

- a. OF CHATTELS.
- b. OF MORTGAGED PROPERTY.
- c. OF LAND.
 - aa. Actual.
 - bb. Constructive.

XI. PRESCRIPTION.

I. CONSTRUCTION OF STATUTE.

1. The term "beyond sea," as used in the statute of limitations of 1825, (R. S. 1825, 510, § 1,) construed to mean without the United States. [OVERRULING

Shreve v. Whittlesey, vii. 473, and *Bedford v. Bradford*, viii. 233.] *Marvin v. Bates*, xiii. 217. *Fackler v. Fackler*, xiv. 431. *Keeton v. Keeton*, xx. 530.

II. WHEN AND UNDER WHAT CIRCUMSTANCES IT BEGINS TO RUN.

a. GENERALLY.

2. It is settled that, after the statute of limitations begins to run against a claim, nothing stops it. *Smith v. Newby*, xiii. 159.

3. Where a cause of action accrues abroad, the statute of limitations will not commence running until the party liable to suit comes within this State. The statute applies as well to non-residents as to citizens. *King v. Lane*, vii. 241. *Tagart v. The State of Indiana*, xv. 209.

4. Where one of several parties, who were bound by an agreement to pay such assessments as might be made upon them for a specified purpose, failed to pay the assessment made against him, and they were paid by the others, the statute of limitations did not begin to run to prevent a recovery back until the date of the last payment. *Finney v. Brant*, xix. 42.

b. COVENANT.

5. A covenant to make and deliver a deed, on the demand of the covenantee, is broken by the first refusal to comply with the terms of the covenant, and a right of action accrues immediately thereon, which can only be barred by satisfaction or a release. *Kyle v. Hoyle*, vi. 526.

c. BONDS AND NOTES.

6. The statute of limitations begins to run on a note payable "on demand" from the day of its date. *Easton v. McAllister*, i. 662.

7. But on a promissory note from the date of its maturity, and not from the date of its execution, and a plea of the statute must be framed accordingly. *Johnson v. Buckner*, iv. 624.

8. Under the statute of 1825, the ten years within which actions of debt on bonds and notes must be brought, did not commence running till the act went into effect. *Weber v. Manning*, iv. 229.

d. AGAINST INHABITANTS OF A TOWN.

9. The statute of limitations does not begin to run against the inhabitants of a town, until they are incorporated, though under an act of the Legislature, authorizing the trustees of the town to sell vacant and unoccupied lands, and an ordinance of the town, directing the mode of such conveyances, the claims of the occupant may be a good ground of compromise. A title under the ordinance must prevail over any length of adverse possession prior to the incorporation of the town. *Reilly v. Chouquette*, xviii. 220.

e. SLANDER.

10. In slander, the cause of action accrues from the time the words were spoken; and the fact that they did not come to the plaintiff's knowledge till within the year next before the action was commenced, will not take the case out of the statute. *Barnard v. Boulware*, v. 454.

f. ADMINISTRATORS.

11. The statute of limitations begins to run against an administrator only from the date of the letters granted. *Polk v. Allen*, xix. 467.

12. The statute of limitations begins to run in favor of an administrator and against a distributee from the date of the final settlement and order of distribution. *The State v. Blackwell*, xx. 97.

See ADMINISTRATION, 35, 36, XI.

g. ADVERSE POSSESSION.

13. The slaves in controversy were originally placed by the plaintiff in the possession of his brother, the defendant's vendor, to become the property of the latter, if the plaintiff never returned from his travels, which he was then about commencing—*Held*, that the possession, after the long absence of the plaintiff and his supposed death, must be considered to have commenced adversely when ownership was assumed by the brother. *Carter v. Feland*, xvii. 383.

14. As a general rule the statute of limitations will commence running in favor of an adverse possession from the date of the accrual of a right to dispossess by action the adverse possessor. *Per* RICHARDSON, J. *Gray v. Givens*, xxvi. 291.

15. A United States survey of the common confirmed to Carondelet was not necessary in order that the statute of limitations might commence running against it in favor of an adverse possession of a portion of said common. *Funkhouser v. Langkopf*, xxvi. 453.

16. Previous to the passage of the acts of February 6, 1839, (Acts 1838-9, 211, § 2,) and March 1, 1851, (Acts 1850-1, 148, § 1)—the former of which authorized the town of Carondelet to lease, and the latter to dispose absolutely of, its common—it might have maintained an action of ejectment to recover possession of any portion thereof adversely held; consequently, the statute of limitations might have commenced running against it in favor of an adverse possessor. *Ibid*.

See INFRA X; . . . HUSBAND AND WIFE 33.

h. EFFECT OF DISABILITIES.

17. When the statute of limitations commences running, no subsequent disability will stop it. *Landes v. Perkins*, xii. 238.

18. As cumulative disabilities under the statute of limitations are not allowed, where a right to sue accrues in favor of an infant female, the statute begins to run when she comes of age, although she had previously married. Where two disabilities exist when the right to sue accrues, (infancy and marriage, for

instance,) the statute does not begin to run until both are removed. *Keeton v. Keeton*, xx. 530.

See ESTOPPEL 18.

i. TRUSTS.

19. The trusts not reached or affected by the statute of limitations, are those technical and continuing trusts that are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of courts of equity. *Johnson v. Smith*, xxvii. 591.

20. If a person assuming to act as guardian for another without any legal authority so to do, should receive moneys to be appropriated to the latter's benefit, the statute of limitations would commence to run immediately, unless the existence of a disability should prevent it. *Ibid.*

See CONSTABLE 12.

III. DOES NOT RUN AGAINST THE STATE.

21. The statute of limitations does not run against the State unless expressly named therein. *Parks v. The State*, vii. 194. *The State v. Fleming*, xix. 607.

22. But this rule does not apply to suits on official bonds, brought in the name of the State, for the use of individuals. *The State v. Pratte*, viii. 286.

IV. AGAINST WHOM AVAILABLE.

23. The statute of limitations may be a bar to a debt contracted in a fiduciary capacity. *Benton v. Lindell*, x. 557.

24. The statute of limitations runs against executors and administrators. *Milan v. Pemberton*, xii. 598.

25. Where an administrator, at a fraudulent sale of negroes made by him, purchases them, and afterwards, openly and notoriously, with the knowledge of the heirs, asserts title in himself, the statute of limitations is a bar to a bill brought by the heirs for relief. *Keeton v. Keeton*, xx. 530.

26. The statute of limitations runs against municipal corporations and other authorities established to manage the affairs of the political subdivisions of the State, the same as against private individuals. The rule that time does not run against the State, does not apply to them. *St. Charles County v. Powell*, xxii. 525.

27. The sums received by the several counties of this State out of the "road and canal fund," under the several acts of the legislature, (R. S. 1835, 553—Acts 1836—7, 108,) belonged exclusively to the counties, though affected with a trust for local purposes; and the statute of limitations would run against the counties on bonds executed in their favor by persons to whom the fund had been loaned. *Ibid.*

28. And the fact that the obligor of such a bond became a Judge of the County

Court, before the term of the limitation expired, will not remove the statute bar. *Ibid.*

See GARNISHMENT 32.

V. IN WHAT TIME A BAR—PRESUMPTION OF PAYMENT.

29. The action of covenant is limited by the statute (R. S. 1835, 393, § 1—396, § 2) to twenty years. *Pennington v. Castleman*, vi. 257. [But by the R. S. 1855, 1047, § 2, covenant is limited to ten years.]

30. Prior to 1845, (R. S. 1845, § 721, § 16,) there was no statute limiting the time within which an action of covenant might be brought. *Maeder v. City of Carondelet*, xxvi. 112.

31. Under the statute, (R. S. 1845, 714,) no lapse of time short of twenty years from the time of the rendition of a judgment of this or another State would bar an action on such judgment. *Manning v. Hogan*, xxvi. 570.

32. To extinguish or bar an equity of redemption, where lapse of time alone is relied on, twenty years must have elapsed since the last recognition of the mortgage. *McNair v. Lott*, xxv. 182.

33. The presumption of payment of a judgment after the lapse of twenty years, raised by the common law, continues unaffected by the statute of 1835. (R. S. 1835, 396, § 1.) That act is only cumulative. *Clemens v. Wilkinson*, x. 97.

34. So, also, in regard to bonds. *Smith v. Benton*, xv. 371.

VI. EFFECT OF A PROMISE OR ACKNOWLEDGMENT.

35. To take a case out of the statute of limitations there must be either an express promise to pay or an acknowledgment of an actual subsisting debt on which the law would imply a promise. *Buckner v. Johnson*, iv. 100.

36. An acknowledgment by the defendant that the note sued on was given by him and had not been paid, and that he did not intend to pay it because it was given for land to which the payee had no title, is not sufficient. *Ibid.*

37. Nor is it sufficient that the defendant said to the witness, in a conversation in relation to the subject matter of the suit, "that he (the defendant) must have some money or the plaintiff would sue him;" nor would an acknowledgment by the defendant that the plaintiff had not received the amount of his demand, have that effect. *McLean v. Thorp*, iii. 215. *Same case*, iv. 256.

38. But it is sufficient that the party acknowledged the indebtedness and that it remained unpaid, without any expression of willingness to remain bound. *Elliott v. Leake*, v. 208.

39. So an unconditional promise to renew certain notes which the plaintiff held against the defendant, but which were not then present, nor the amounts of them stated, is sufficient to take them out of the statute of limitations. *Davis v. Herring*, vi. 21.

40. And a promise by a married woman to pay money borrowed by her as agent for her husband, will have the same effect. *Burk v. Howard*, xiii. 241.

41. But under the statute of 1845, (R. S. 1845, 720, § 13,) the promise or acknowledgment must be in writing or it is of no effect. *Blackburn v. Jackson*, xxvi. 308. (And so in the revision of 1855, 1052, § 12.)

See PRACTICE, 131.

VII. PART PAYMENT.

42. Payments made by one of several obligors in a bond, will prevent the statute from running as to all. *Per* NAPTON, J. *Callaway County Court v. Craig*, ix. 836.

43. And so payments of interest by one of several joint obligors in a bond, before the statute attaches, removes the bar as to all. *McBRIDE, J., dis. Craig v. Callaway County Court*, xii. 94.

VIII. WHEN ITS OPERATION IS SUSPENDED.

a. BY ACT OF THE DEFENDANT.

aa. Concealment.

44. The concealment described in the statute, (R. S. 1835, 396, § 8,) which prevents its running, need not be with a fraudulent intent; any concealment which prevents the plaintiff from bringing his suit is sufficient. *Harper v. Pope*, ix. 398.

45. A party living in Illinois, purchased goods and had them shipped to his place of residence, and then immediately moved to Clay county, in this State, remained there a short time, and then removed to St. Louis county, but did not inform his creditor of his place of residence—the creditor used proper diligence to discover his residence, and did not find him—*Held*, to be such a concealment as to prevent the statute from running. *Ibid*.

46. Where the defendant obstructs the bringing of an action of trover by concealing the property converted, so that the plaintiff does not come to a knowledge of it for five years next after such conversion, the statute does not run, and the claim is not thereby barred. *WASH, J., dis. Arnold v. Scott*, ii. 13.

47. Where a defendant, by improper conduct, prevents the bringing of an action, he is not within the protection of the statute. *Smith v. Newby*, xiii. 159.

48. But where there is no fault on the part of the defendant, the statute applies, and will protect him, although the plaintiff was in ignorance of his rights and the facts on which they rested. Thus, where a slave was stolen, and subsequently purchased and held in good faith by successive purchasers for more than five years, the claim is barred. It is not the policy of the law to interpose between parties who were equally innocent. *Ibid*.

bb. *Absent and Absconding Debtor.*

49. Absence of a plaintiff from the State does not prevent the statute from running in favor of the defendant, who is a resident in the State. *Smith v. Newby*, xiii. 159.

50. Where a party goes to California with the intention of returning, leaving his family and property, the statute of limitations is not suspended as to him during his absence. *Garth v. Robards*, xx. 523.

51. The exception in the statute of limitations of 1845, (R. S. 1845, 717, § 7,) does not apply where the debtor is a non-resident when the cause of action accrues, but only where, being a resident, he is absent. [*Tagart v. The State of Indiana*, xv. 209, commented upon.] *Thomas v. Black*, xxii. 330.

52. If, at any time within the period allowed for commencing an action, the debtor does any act by which the creditor is prevented from bringing his suit, as by absconding, then the debtor loses the benefit of the time the statute has been running. *Nelson v. Beveridge*, xxi. 22.

cc. *Removal from the State where the Contract was made.*

53. The remedy on a contract is governed by the *lex fori*; and the removal of a party from the State where the contract was made will not, of itself, stop the running of the statute of limitations. *Bobb v. Shipley*, i. 229. *Cartmill v. Hopkins*, ii. 220. *King v. Lane*, vii. 241.

54. In a case arising under the proviso in § 1 of the statute, (R. S. 1825, 510,) it was held, that the statute of limitations could not be pleaded in behalf of a debtor who removed from this State to Scotland, where he remained four years and then returned to this State. The bringing and maintaining an action for the debt was, in that case, "obstructed," within the meaning of the proviso, and that, too, although the debtor might have left behind him in this State property enough to satisfy the demand against which the creditor might have proceeded by attachment. *WASH, J., dis. Hancock v. Heagh*, i. 678.

b. OPEN ACCOUNTS.

55. Where there are mutual running accounts, and the last item on either side is not barred by the statute, the whole account is saved from its operation. *Penn v. Watson*, xx. 13.

c. LEGAL PROCEEDINGS.

56. A suit in equity becomes *lis pendens* from the filing of the bill, so as to prevent the bar of the statute, if the issuing of the summons was delayed by agreement of counsel. *Wright v. Pratt*, xvii. 43.

d. COVERTURE.

57. A right of entry or of action for the possession of land may accrue to a married woman, and where such right of entry accrued before December 1, 1835, an action may be sustained within twenty years after the woman becomes discoverd. *Reaume v. Chambers*, xxii. 36.

IX. PLEADING.

58. In civil suits, the party, in order to avail himself of the statute of limitations, must plead it. *Tramell v. Adam*, ii. 155. *Benoist v. Darby*, xii. 196.

59. Which he cannot do by way of demurrer. *Smith v. Dean*, xix. 63.

60. At the time a note was executed, suits upon that class of demands were limited to five years, but, before the note matured, the limitation was changed to ten years—*Held*, that a plea of non-assumpsit within ten years was good. *Davis v. Hascall*, iv. 58.

61. If a complainant relies upon a disability as exempting him from the operation of the statute, he should set it up in his bill. *Keeton v. Keeton*, xx. 530.

62. To a plea of the statute of limitations, the plaintiff replied that the defendant removed from the State where the debt was contracted before the cause of action accrued, his domicile "then and theretofore being beyond seas"—*Held*, that the replication tendered an immaterial issue, and did not bring the case within the proviso of the statute. *Smith v. Bogliolo*, v. 344.

See PLEADING, 59, 160, 161.

X. ADVERSE POSSESSION.

a. OF CHATELS.

63. It is well settled that the five years' possession which gives title under the statute of limitations, and enables a defendant to maintain his possession, or a plaintiff to sustain his action, must be an adverse possession. (See R. S. 1835, 393, § 2.) *Smoot v. Wathen*, viii. 522.

b. OF MORTGAGED PROPERTY.

64. In a suit by the mortgagee to redeem, the statute of limitations will not avail the mortgagee unless he has been in actual possession of the land. Payment of taxes on wild land is not equivalent to possession. *Bollinger v. Chouteau*, xx. 89.

65. Where a mortgage was given on wild and unimproved land, of which neither party was in possession, there being evidence that the debts were unpaid, the lapse of thirty years is no bar to a foreclosure. *Chouteau v. Burlando*, xx. 482.

c. OF LAND.

aa. Actual.

66. The act of February 2, 1847, to quiet vexatious land litigation, (Acts 1846-7, 94,) is prospective only in its operation. *Paddleford v. Dunn*, xiv. 517.

67. What will constitute an adverse possession of land under the statute of limitations must be determined by the circumstances of each case, and a less weight of evidence is required where the entry is with, than where it is without, color of title. The acts of ownership exercised must be visible and notorious,

and of such a nature as indicate a notorious claim of property in the land. *Draper v. Shoot*, xxv. 197.

68. In determining the question of adverse possession, the payment of taxes by the person asserting title by adverse possession is a fact that may, with other circumstances, be considered by the jury. *Ibid*.

69. Twenty consecutive years adverse possession of land confers upon the possessor an absolute title against all persons not excepted by the terms of the statute of limitations. *Biddle v. Mellon*, xiii. 335. *Blair v. Smith*, xvi. 273.

70. And a possession of less than twenty years will prevail against a subsequent possession of less than twenty years, provided the former was under a claim of right, and has not been abandoned. *Crockett v. Morrison*, xi. 3. See *Smith v. Lorillard*, 10 John, R., 355.

71. To recover upon a title acquired by an adverse possession for twenty years, it is not necessary that the claimant's possession, or that of those under whom he claims, should be connected with the possession of previous occupants by instruments in writing; the continuity of the possession may be shown by any testimony that is legitimate and pertinent. *Menkens v. Blumenthal*, xxvii. 198.

72. Adverse possession, to constitute a bar, must be uninterrupted. *Harrison v. Cachelin*, xxiii. 117.

73. In order to constitute such a continuous adverse possession in successive occupants as will amount to a bar under the statute, it is necessary that there should be some privity between such occupants. *Chouquette v. Barada*, xxiii. 331.

74. In 1820 A. conveyed to B. all his interest in a tract of land, who soon after took possession, lived on and cultivated it for eight or ten years, and then removed to another State. A part of the time after that he had tenants on it, and when not tenanted, had an agent residing in the neighborhood to rent it, to pay the taxes, to superintend and control it, and to protect it from trespassers. B. always paid the taxes, and no other person had paid taxes on it—*Held*, that by such adverse possession he acquired a title after the lapse of twenty years. *Williams v. Dongan*, xx. 186. And see *Menkens v. Ovenhouse*, xxii. 70.

75. Where a minor *femme covert* joined with her husband in a conveyance of land belonging to her—*Held*, that possession under the deed was adverse to any interest in the land subsequently acquired by the wife, and adverse to all others. *Norcum v. Gaty*, xix. 65. *Norcum v. Sheahan*, xxi. 25.

bb. Constructive.

76. Although as a general rule a party in actual possession of part, under color of title, is deemed in possession of the whole, yet this rule does not apply as against the real owner, who is also in possession of part, claiming the whole. The only adverse possession as against him is actual possession. *Cottle v. Sydnor*, x. 764.

77. One claiming a portion of a tract of land can derive no assistance from the occupation of another portion of the same tract by another person claiming under the same grantor, in establishing an adverse possession in himself, and him under whom he claims. *Robert v. Walsh*, xix. 452.

78. Where A. conveys to B. contiguous lots by separate granting words, descriptions, &c., and B. builds a house upon one of the lots, and makes an enclosure about the same, and, through mistake or ignorance of the boundaries, and without any design of taking possession of it, extends this enclosure over upon the other lot, so as to embrace a small portion of it—*Held*, that this is not a possession within the meaning of the statute. (R. S. 1845, 715, § 1.) Although the actual detention exists, there is wanting the intention on the part of the possessor which is necessary to constitute a civil possession. *Cutter v. Waddingham*, xxii. 206.

79. *Quære*.—Whether one who has taken possession of a small portion of a large lot or tract of land, under a deed, not of the lot, but merely of whatever interest the grantor may be found to have in it, has, without anything more, a possession extending over the whole lot, within the meaning of the statute. *Ibid*.

80. Where two tracts of land interfere with or lap on each other in part, and each proprietor is in possession, possession of the lapped part by him who has the inferior title extends no further than the land actually occupied by him. The rule that the possession of part is possession of the whole does not apply to such a case, and the constructive possession of him who has the inferior title, will not prevail over the legal constructive possession of the true owner, but will be confined to the part actually occupied by him who has the inferior title. *McDonald v. Schneider*, xxvii. 405.

81. Actual possession of part of a tract of land, under claim and color of title to the whole, is constructive possession of the whole as against all persons not having title; as against such person in possession of part, the constructive possession of the residue would lie in the true owner. *Griffith v. Schwenderman*, xxvii. 412.

82. Where there are two tracts of land, and the one interferes with or laps on the other, the statute of limitations has no operation against him who has the best right, unless he who has the inferior right takes an adverse, exclusive, actual possession. In such cases the rule that possession of part is possession of the whole does not apply; and the statute only protects the intruder, or him having the inferior title, to the extent of his actual occupancy; and on being in the actual occupancy of part of the tract of him having the better title, he has no constructive possession as to the part not occupied; but the legal constructive possession of the true owner will prevail over the constructive possession of him having the inferior title. *Ibid*.

See MASTER AND SLAVE, 1; . . . PRACTICE, 135, 186; . . . SUPRA, 13-16.

XI. PRESCRIPTION.

83. The statute of limitations passed in 1807, (1 Ter. L. 144,) operated a repeal of the Spanish law on the subject of prescription. *Little v. Chauvin*, i. 626.

84. And the territorial statute of December 17, 1818, (1 Ter. L. 598,) abolished all prescriptions. *Landes v. Perkins*, xii. 238.

85. Under the civil law a title by prescription could be acquired only through long continued, peaceable, uninterrupted, unequivocal public possession, as master of the soil, and not on sufferance or permission, and then not against the government. *Lajoie v. Primm*, iii. 529.

86. A free and uninterrupted public possession of land for a period of less than thirty years would not avail under the civil law to give title by prescription, as between individuals, unless it was fair and formal in its origin. *Ibid.*

See ADMINISTRATION, XI; . . . CHANCERY, 66-68; . . . CONVEYANCES, 61; . . . JUSTICE OF THE PEACE, 20; . . . MECHANIC'S LIEN, 6, 7; . . . PUBLIC LANDS, 169, 170, 190-192.

LOAN OFFICE.

1. In an action on a covenant to pay a certain sum in "Loan Office Certificates," the defendant may show the value of the certificates at the time the debt became due, as the criterion of damages for the non-delivery thereof. *Thomas v. Starling*, i. 583.

See LAWS, 67, 68.

LOCAL DECISIONS.

- I. JEFFERSON CITY.
- II. PALMYRA.
- III. NORTH MISSOURI R. R. CO.
- IV. HANNIBAL AND ST. JOSEPH R. R. CO.,
- V. DUNKLIN COUNTY.
- VI. CITY OF FAYETTE.
- VII. PLATTE CITY.
- VIII. BANK OF EDWARDSVILLE.
- IX. MISSOURI STATE MUTUAL FIRE AND MARINE INS. CO.
- X. ST. LOUIS MUTUAL FIRE AND MARINE INSURANCE CO.
- XI. TOWN OF LOUISIANA.

I. JEFFERSON CITY.

1. The charter of Jefferson City, (Acts 1838-9, 307, §§ 7, 12,) gives to the Mayor and Board of Aldermen no power to pass an ordinance for the punishment of indictable offenses. SCOTT, J., *dis.* *Jefferson City v. Courtmire*, ix. 683.

II. PALMYRA.

2. The act incorporating the town of Palmyra, (Acts 1844-5, 155, § 10,) which gives the trustees power, if the owner or occupant of lots adjacent to the streets of said town should fail to pave the same as directed by ordinance, to pave them and recover the full expense thereof from such owner or occupant, is constitutional. And such suit is properly brought in the name of the corporation. *Inhabitants of Palmyra v. Morton*, xxv. 593.

III. NORTH MISSOURI R. R. CO.

3. A proceeding instituted in the Circuit Court by the North Missouri Railroad Co., under its charter, (Acts 1850-1, 485, §§ 7-10,) to obtain a condemnation of land upon which it had located its road, is a proceeding in which the court acts in its judicial capacity, and an appeal lies to the Supreme Court from its final judgment. *North Missouri R. R. Co. v. Lackland*, xxv. 515. *Same v. Reynal*, xxv. 534.

4. The company at any time before final judgment may change the route of its road and dismiss such proceedings. *Ibid.* *Ibid.*

5. An allegation in a petition in behalf of the North Missouri R. R. Co., for the condemnation of the land upon which its road was located, that the road passed hills and valleys, and that a strip of one hundred and fifty feet in width was necessary for its construction, is not traversable. *North Missouri R. R. Co. v. Gott*, xxv. 540.

6. In a proceeding in behalf of the North Missouri R. R. Co. to condemn land, three commissioners were, in accordance with the prayer of the petition, appointed to assess the damages—*Held*, it not appearing that the company had accepted the provisions of the general railroad law, (Acts 1852-3, 128, §§ 14, 15,) requiring the appointment of five commissioners, &c., that the proceeding was properly conducted under their act of incorporation, (Acts 1850-1, 485, §§ 7-10.) *Ibid.*

IV. HANNIBAL AND ST. JOSEPH R. R. CO.

7. Under the charter of the Hannibal and St. Joseph Railroad Co., (Acts 1846-7, 156,) a writ of error does not lie to the action of the Judge of the Circuit Court upon the report of the viewers appointed to assess damages to

individuals over whose land the road is run. The judgment entered upon the report is final. *Hannibal and St. Joseph R. R. Co. v. Morton*, xx. 70.

8. Where, in proceedings instituted by the Hannibal and St. Joseph R. R. Co. to obtain the condemnation of land upon which said railroad had been located, it was stated, in the report of the reviewers, that before proceeding to examine the damages, they took the oath prescribed by the statute, the oath not being set forth—*Held*, it not appearing that any objection was made to the report on this ground, that the recital in the report was sufficient to show that the oath had been taken. *Hannibal and St. Joseph R. R. Co. v. Morton*, xxvii. 317.

9. It is not good ground for quashing the proceedings in such case that the record does not show that the viewers were citizens of the county; nor that the damages awarded were inadequate. *Ibid*.

See TRESPASS, 48.

V. DUNKLIN COUNTY.

10. The District County Court within and for the county of Dunklin had power to transfer alternate sections of the "swamp lands" of Dunklin county to the Cairo and Fulton Railroad Company, in payment of a subscription to the stock of that company, made by said County Court. *Dunklin County v. County Court*, xxiii. 449.

VI. CITY OF FAYETTE.

11. The charter of the city of Fayette, (Acts 1855, 212, § 11,) conferring upon the Mayor the same jurisdiction in cases arising in that city that Justices have in their respective townships, prevents him from entertaining jurisdiction of an action for a penalty exceeding ninety dollars imposed by an ordinance of the city. *City of Fayette v. Shafroth*, xxv. 445.

VII. PLATTE CITY.

12. The act incorporating the town of Platte City, (Acts 1844-5, 97,) did not divest the County Court of Platte county of its jurisdiction over that part of a road lying within the corporate limits of said town. *Baldwin v. Green*, x. 410.

VIII. BANK OF EDWARDSVILLE.

13. The charter of the Bank of Edwardsville, Illinois, does not give to the president and directors of the bank authority to assign notes made payable to them. *Hamtramck v. Bank of Edwardsville*, ii. 169.

IX. MISSOURI STATE MUTUAL FIRE AND MARINE INS. CO.

14. As to the rights of the Missouri State Mutual Fire and Marine Insurance Co., under § 11 of charter, (Acts 1848-9, 381,) relating to assessments for payment of losses, &c. *Missouri State Mutual Fire and Marine Ins. Co. v. Spore*, xxiii. 26.

X. ST. LOUIS MUTUAL FIRE AND MARINE INSURANCE CO.

15. By the charter of the St. Louis Mutual Fire and Marine Insurance Co., (Acts 1850-1, 80,) assessments, on account of losses happening during membership, may be made after membership ceases. *St. Louis Mutual Fire and Marine Ins. Co. v. Boeckler*, xix. 135.

16. And a party failing to pay an assessment within thirty days after publication of notice, is liable to pay the whole amount of his premium note. *Ibid.*

17. And the company is entitled to retain a premium note until all losses for which it is liable to be assessed are paid. *Ibid.*

XI. TOWN OF LOUISIANA.

18. Section 6 of the act incorporating the town of Louisiana, which provides that the Recorder shall have power to determine all cases involving a violation of the ordinances of said town, (Acts 1846-7, 147,) alters the general law relating to towns, (R. S. 1845, 1051, § 12,) and gives the Recorder exclusive jurisdiction in such cases. *Town of Louisiana v. Hardin*, xi. 551.

See COUNTY, 1;...COURTS, 10-13;...CRIMINAL LAW, 291;...JURISDICTION, 37;...RAILROADS;...ST. LOUIS.

LOTTERY.

1. The act amending the charter of New Franklin, (Acts 1838-9, 311,) only repealed so much of § 7 of the amended act (2 Ter. L. 328,) as provided that the board of trustees of the town should have power to raise by lottery a sum of money, not exceeding \$15,000 for the construction of a railroad. The object of the amendatory act was to divert the application of the money, so to be raised, to the construction of a macadamized road. The trustees were authorized after the passage of the act of 1839, to contract as provided in § 3 of the act of 1835, (2 Ter. L. 476.) *The State v. Morrow*, xxvi. 131.

2. A ticket in a lottery, which entitles a holder to one fourth of the prize drawn to its members, although usually called a quarter of a ticket, is a "lottery

ticket," within the meaning of the act of December, 19, 1842, (Acts 1842-3, 85,) and may be so described in an indictment under this act. *Freleigh v. The State*, viii. 606.

3. And it is not necessary to set out the ticket by its tenor or purport; it is sufficient to describe it as "a certain lottery ticket." *Ibid*.

4. Nor is it necessary to describe the ticket in the plural, although the statute is in the plural. *Ibid*.

5. An indictment under the statute, relating to lotteries (R. S. 1845, 723,) which charges the defendant with selling "tickets in a device in the nature of a lottery, called a raffle," is sufficient. It is not necessary that the words "lottery ticket" should be used. *The State v. Kennon*, xxi. 262. *The State v. Woodward*, xxi. 265.

See LAWS, 41, 69, 70; . . . TROVER, 1.

MALICIOUS PROSECUTION.

I. MALICE, AND WANT OF PROBABLE CAUSE.

II. PLEADING.

III. EVIDENCE.

I. MALICE, AND WANT OF PROBABLE CAUSE.

1. An action for a malicious prosecution will lie where an affidavit for a search warrant is made before a Justice, maliciously, and without probable cause, although the magistrate refuse to issue the warrant. *Miller v. Brown*, iii. 127.

2. In an action for malicious prosecution, the point of inquiry is, whether there was in fact probable cause for the prosecution, and not whether the defendant had probable cause to believe there was. *Hickman v. Griffin*, vi. 37.

3. Malice, as well as a want of probable cause, is necessary to sustain an action for malicious prosecution. *Per* NAPTON, J. *Riney v. Vanlandingham*, ix. 807. *Frissell v. Relfe*, ix. 849.

4. What constitutes probable cause is a question of law for the court, but the jury must decide upon the facts. *Brant v. Higgins*, x. 728.

II. PLEADING.

5. In an action for a wrongful prosecution, a petition which omits to state that the prosecution was malicious, and that the plaintiff was acquitted, is insufficient. *Mooney v. Kennett*, xix. 551.

III. EVIDENCE.

6. In a civil action for malicious prosecution, the defendant may give evidence of what he swore on the trial of the indictment. *Hays v. Waller*, ii. 222.

7. But this is allowed only on grounds of necessity, where there was no other person present when the felony was committed. *Hickman v. Griffin*, vi. 37. *Riney v. Vanlandingham*, ix. 807.

8. That the plaintiff, in a suit for a malicious prosecution, was a person of notoriously bad character at the time the prosecution was instituted, is a fact admissible in evidence on the part of the defense, as tending to show probable cause. *TOMPKINS, J., dis. Miller v. Brown*, iii. 127.

9. In an action for malicious prosecution, parol testimony is admissible to show that the plaintiff is the same person named in the Justice's record before whom the prosecution was instituted. *Stone v. Powell*, v. 435.

10. But the defendant's plea of justification, in such a case, which had been disposed of by demurrer, is not admissible as evidence on the trial of an issue raised under another plea. *Ibid.*

11. In an action for malicious prosecution, the defendant may show that, in good faith and upon a full representation of all the facts, he was advised by counsel that a prosecution was warranted, but he will not be permitted to show that he was advised by any other than counsel, as by the Justice who issued the warrant. *Williams v. Vanmeter*, viii. 339.

12. In an action for malicious prosecution, the acquittal of the plaintiff is not sufficient evidence of want of probable cause. *Ibid.*

13. In an action for malicious prosecution, in causing the plaintiff to be arrested as a vagrant, the warrant upon which the arrest was made is admissible in evidence, although it does not sufficiently describe the offense. *Ibid.*

14. In an action for a malicious arrest, the verdict of a jury in the case in which the arrest was made, though competent evidence for the plaintiff to show the want of probable cause, is not of equal weight with a discharge by the examining magistrate in a criminal case, nor the refusal of a grand jury to find an indictment. The weight to be given to the verdict as evidence, must depend upon the circumstances attending its rendition. *Brant v. Higgins*, x. 728.

M A N D A M U S .

I. WHEN IT LIES.

II. FORM OF THE WRIT.

III. SERVICE AND RETURN.

IV. JOINDER WITH OTHER ACTION.

V. TO THE GOVERNOR.

VI. PROCEEDINGS UNDER.

VII. APPEAL.

I. WHEN IT LIES.

1. Where a judgment is confessed before a clerk in vacation, (See 1 Ter. L. 118, § 37,) and the court refuses to have the judgment entered as of the term next succeeding the confession, an alternative *mandamus* will issue. *Vernon v. Boggs*, i. 116, 274. *Kerr v. Rector*, i. 116.

2. An order of a Circuit Court striking a cause from the docket, is not a decision of the court, but a refusal to proceed, and a writ of error will not lie from it. The remedy of the party, if any, is by *mandamus*. *Astor v. Chambers*, i. 191.

3. The Supreme Court will not grant a *mandamus* to compel the Circuit Court to grant an appeal, when a statute exists authorizing the Supreme Court, or any judge thereof, in vacation, to grant a *supersedeas* to the judgment of the Circuit Court, and an appeal. (1 Ter. L. 718, § 6.) *Byrne v. Harbison*, i. 225.

4. Where an application was made to the Supreme Court for a *mandamus* to the Circuit Court to reinstate a case dismissed—*Held*, that the rule for the *mandamus*, if granted, would be premature, unless the party applying had shown that he applied to the Circuit Court to reinstate the cause, and it was refused. *Nichols v. St. Louis Circuit Court*, i. 357

5. The Supreme Court will not issue a *mandamus* commanding the Circuit Court to alter its record, or to make it conform to the state of facts set forth in affidavits. *Dixon v. Judge*, iv. 286.

6. Where the County Court refused to grant an appeal from its decision, revoking letters of administration, and the Circuit Court on petition of the administrator, issued to the County Court a rule to show cause why an appeal should not be granted—*Held*, that the proceedings under the rule were void under the statute, (Acts 1836-7, 72,) and that a *mandamus* should have issued in the first instance. *Mullanphy v. St. Louis County Court*, vi. 563.

7. The Circuit Court has power by *mandamus* to control the action of an inferior tribunal. *St. Louis County Court v. Sparks*, x. 117.

8. A *mandamus* may be issued to restore a person to an office to which he is entitled, but it cannot be issued where the office is already filled by a person holding by a color of right. In such a case, a *quo warranto* is the proper remedy. *Ibid*.

9. A *mandamus* will not lie from the Circuit Court to compel the County Court to set aside an order vacating a road. The County Court has exclusive jurisdiction in such matters, and its action is final. *Callaway County Court v. Inhabitants of Round Prairie Township*, x. 679.

10. Where a change of venue is awarded after verdict found, a *mandamus* will lie from the Supreme Court to compel the Circuit Court granting the change, to proceed and determine the cause. *Ex parte Cox*, x. 742.

11. A *mandamus* is the proper proceeding to compel a County Court to do its duty respecting roads. *Platte County Court v. McFarland*, xii. 166.

12. A writ of *mandamus* will not lie to correct the errors of inferior tribunals by annulling what they may have done erroneously, nor to guide their discretion, nor to restrain them from exercising power not delegated to them; it will not,

therefore, lie to a County Court, directing it to vacate an order selling swamp lands to a railroad company, in payment of a subscription of stock, and commanding the County Court and all others to desist from carrying said order into execution. *Dunklin County v. County Court*, xxiii. 449.

13. A *mandamus*, as a general rule, will not issue, unless the party asking it has a clear right, and no other specific legal remedy; it will not be granted to bring under review the proceedings of an inferior court on the ground of error, and will not be granted, therefore, where an appeal or writ of error will lie. *Williams v. Cooper Court of Com. Pleas*, xxvii. 225.

14. A *mandamus* will lie from the Circuit Court to the County Court requiring it to grant an appeal from an order removing the guardian of an insane person, although a writ of error might have been resorted to. *Hall v. Audrain County Court*, xxvii. 329.

II. FORM OF THE WRIT.

15. A *mandamus* should run in the name of the State, (Const. Mo. Art. V. § 19,) *Mullanphy v. St. Louis County Court*, vi. 563.

III. SERVICE AND RETURN.

16. A *mandamus* in the alternative, against a court, may be served on the officers composing it in vacation, by delivering a copy and showing the original process. It may be addressed to the court, or to the individuals composing it. But where the proceeding against a court is for disobedience, the judges are to be proceeded against individually. *St. Louis County Court v. Sparks*, x. 117.

17. A *mandamus* is served by delivering it to the person to whom it is directed, and he makes his return to it. For an officer to offer to read the writ to the person to whom it is directed, and then to keep it and make his return upon it, as he would do on a summons, is no service. *Ladue v. Spalding*, xvii. 159.

IV. JOINDER WITH OTHER ACTION.

18. The remedy by *mandamus*, not being affected by the new code, cannot be joined with other actions, under the rule as to the joinder of different causes of action. *Barada v. Inhabitants of Carondelet*, xvi. 323.

V. TO THE GOVERNOR.

19. Upon an application for a *mandamus* to the governor, requiring him to issue the bonds of the State to a railroad company, under a law alleged by him to have been passed over his veto without the observance of the forms prescribed

by the constitution, the court sustained the jurisdiction of the application, and passed upon the validity of the law, reserving the question of power to *mandamus* the governor for the final hearing upon the return to a conditional writ. LEONARD, J., *dis.* *Pacific Railroad v. Governor*, xxiii. 353.

VI. PROCEEDINGS UNDER.

20. Where a cause is taken from a Justice to the Circuit Court by *mandamus*, it is error to reverse the judgment of the Justice, and enter up a judgment against the party who recovered in the court below. The Circuit Court should proceed to a trial *de novo*. *Duncan v. Travis*, iv. 369.

21. The new code does not apply to the proceedings upon *mandamus*. *Smith v. St. Francois County Court*, xix. 433.

VII. APPEAL.

22. An appeal will lie from an order awarding or refusing a peremptory *mandamus*. *Lewis v. Price*, xi. 398.

See APPEAL, 43; . . . CLERK OF COURT, 2; . . . ERROR, 24, 27; . . . JUSTICE OF THE PEACE, 28, 32; . . . SCHOOLS, 6.

MASTER AND SERVANT.

I. MASTER'S LIABILITY TO SERVANT.

II. MASTER'S LIABILITY FOR ACTS OF SERVANT.

I. MASTER'S LIABILITY TO SERVANT.

1. Where the defendant signed an agreement, in which the work done by the plaintiff and the price to be paid him are stated, the defendant can discharge the plaintiff and withhold payment, only because of some failure or incompetency to render the services, or for some misconduct. *Sugg v. Blow*, xvii. 359.

2. If, in an action against the master on such a contract, he proposes to discharge himself on the ground of fraudulent inducements by the plaintiff to make it, he must so state; if for want of competent skill in the plaintiff, he must pay for what benefit he has received; if for impropriety of conduct, or a failure to do work contracted for, these particulars must be shown, and the work must appear to have been required by the contract. *Ibid.*

3. A plaintiff cannot recover compensation for merely voluntary services bestowed without employment from the defendant. *Lynch v. Bogy*, xix. 170.

4. Where a plaintiff, in a suit for wages, proves services rendered, but omits to prove the value of those services, the decision of the court that he cannot recover, is erroneous, he being entitled to a nominal sum at least. *Owen v. O'Reilly*, xx. 603.

II. MASTER'S LIABILITY FOR ACTS OF SERVANT.

5. Municipal corporations are not liable for the acts or negligence of their contractors, unless the relation of master and servant exists between them. *Scott, J., dis. Barry v. City of St. Louis*, xvii. 121.

6. To make a master liable for damages caused by his servant, it must appear that he commanded the unlawful act, or that the injury resulted from the negligence of the servant, while he is actually employed in his master's service. *Douglass v. Stephens*, xviii. 362.

7. Where one employs a person carrying on a distinct trade or calling to perform certain work for him, the employee being independent of the control of the employer, the latter is not responsible for any injury to third persons caused by the negligence of the employee or his workmen. *Morgan v. Bowman*, xxii. 538.

8. But where one is employed by the day to superintend work, and is subject to the control of his principal, the principal is responsible for such injuries. *Ibid.*

9. Where, in a suit against the keeper of a livery stable, to recover damages for injuries sustained in consequence of negligent driving by one of his servants, evidence is inadmissible to show that the general character of the servant was that of a prudent and careful driver. *Boggs v. Lynch*, xxii. 563.

MASTER AND SLAVE.

I. MASTER'S RIGHT OF PROPERTY IN SLAVE.

II. A NEGRO CANNOT OWN A SLAVE.

III. MASTER'S LIABILITY FOR ACTS OF SLAVE.

- a. GENERALLY.
- b. MURDER.
- c. ARSON.
- d. LARCENY.
- e. EVIDENCE.

I. MASTER'S RIGHT OF PROPERTY IN SLAVE.

1. If a master permits his infant slave to remain with her mother during her infancy, free from his control, and the mother even receives the benefit of the

child's services after it becomes old enough to render them, in remuneration for her care during its infancy, the possession of the mother will not be such adverse possession as is protected by the statute of limitations. *Davis v. Evans*, xviii. 249.

2. If a slave give a watch to his wife, who is owned by another master, a third person, who obtains possession of it wrongfully, will not be permitted to deny the validity of the transfer, in a suit brought against him by the owner of the wife to recover its value, the owner of the husband not objecting to the disposition made by his slave of the watch. *Folden v. Hendrick*, xxv. 411.

II. A NEGRO CANNOT OWN A SLAVE.

3. A free negro cannot own slaves. *Per* SCOTT, J. GAMBLE and RYLAND, J. J., *dis.* *Davis v. Evans*, xviii. 249.

III. MASTER'S LIABILITY FOR ACTS OF SLAVE.

a. GENERALLY.

4. Where the court assigns counsel for the defense of a slave, arraigned on a criminal charge, the master of the slave is not liable for the professional services of such counsel, in the absence of any employment by him, or other understanding on the subject. *McGIRK, J., dis.* *Manning v. Cordell*, vi. 471.

5. A verbal message, delivered by a slave, is not evidence against his master, unless it appears that the master subsequently recognized such message. *Maddin v. Edmondson*, x. 643.

6. It is not sufficient to render the owner of a slave liable for goods delivered to the slave, that they were purchased by the slave for the benefit of the master with his assent. *Douglass v. Ritchie*, xxiv. 177.

See ACTION, 49.

b. MURDER.

7. Section 35, Art. IX of the statute of 1835, relating to crimes, (R. S. 1835, 216,) giving redress against masters in certain cases for injuries committed by their slaves, does not apply in a case where the slave of one party kills the slave of another. *Jennings v. Kavanaugh*, v. 26.

8. So under R. S. 1845, (p. 414, § 35.) *Ewing v. Thompson*, xiii. 132.

c. ARSON.

9. The owner of a slave is not liable under the statute, (R. S. 1845, 414, § 35,) for the loss of a horse belonging to plaintiff, where the offense charged against the slave was the burning of the stable in which the horse happened to be at the time of the fire. *Stratton v. Harriman*, xxiv. 324.

d. LARCENY.

10. Under the statute, (R. S. 1845, 414, § 35,) if the slaves of several masters unite in committing a larceny, the owner of one of them will be answerable for all the damages. *Fackler v. Chapman*, xx. 249.

e. EVIDENCE.

11. Where a master is sued for a larceny by his slave, the fact that the goods were found in possession of the slave is a circumstance tending to prove that the goods were taken by him, the weight of which is proper for the determination of the jury. *Ibid.*

12. In an action under the statute, (R. S. 1845, 414, § 35,) against the owner of a slave, to recover damages for the burning of a building, &c., by such slave, the slave's confession is not evidence; nor is it competent to show that it was remarked, in the presence of the owner, that the slave had burned the building and had confessed it, and that he made no reply thereto. *Phillips v. Towler*, xxiii. 401. See EVIDENCE, 82-86.

See CRIMINAL LAW, 401; . . . HABEAS CORPUS, 4.

MECHANICS' LIEN.

I. PROPERTY SUBJECT TO LIEN.

II. PRIORITY OF LIEN.

III. WAIVER.

IV. PROCEEDINGS TO ENFORCE.

- a. LIMITATION.
- b. NOTICE.
- c. FILING LIEN.
- d. THE DEMAND.
- e. SCIRE FACIAS.
- f. PLEADING.
- g. EVIDENCE.
- h. JUDGMENT.
- i. EXECUTION.
- j. COSTS.

I. PROPERTY SUBJECT TO LIEN.

1. A mechanic's lien, under the statute, (R. S. 1835, 107,) cannot be enforced against land not the property of the party causing the erection thereon. *Sibley v. Casey*, vi. 164. [But see R. S. 1855, 1064, and act relating to mechanic's lien in St. Louis county—Acts 1856-7, 668.]

2. No lien attaches for work on bridges or culverts erected on the line of a

railroad, under the mechanic's lien law of St. Louis county. (Acts 1842, 383.) *Dunn v. North Missouri R. R.*, xxiv. 493

3. The St. Louis lien law (Acts 1842-3, 83, § 2,) did not give a lien where the person for whom the building is erected has no interest in the premises, but is a mere tenant at will. *Squires v. Fithian*, xxvii. 134.

II. PRIORITY OF LIEN.

4. Under the St. Louis mechanic's lien act, (Acts 1842-3, 84, § 6,) the lien of a mechanic who supplies materials is superior to incumbrances put upon the building after its commencement, whether such incumbrances be put on before the materials are furnished or not. *Dubois v. Wilson*, xxi. 213.

III. WAIVER.

5. An acceptance by one having a mechanic's lien upon a building, of a deed of trust upon it, to secure the payment, at a future day, of promissory notes given for the debt which gave rise to the lien, is a waiver of the lien. *Gorman v. Sagner*, xxii. 137.

IV. PROCEEDINGS TO ENFORCE.

a. LIMITATION.

6. Where there is a running account of articles furnished by a mechanic for the building of a house, and the last item was furnished within six months of the filing of the lien, he is entitled to recover on the whole account. *Stine v. Austin*, ix. 554. *Viti v. Dixon*, xii. 479.

7. In order to enforce a mechanic's lien under the act of February 24, 1843, (Acts 1842-3, 83,) the person claiming the benefit of it must commence an action within ninety days after the lien is filed. *Lee v. Chambers*, xiii. 238.

See *INFRA*, 13-14.

b. NOTICE.

8. The provisions of the act of 1841, (Acts 1840-1, 105,) which require a sub-contractor to give notice to the owner of a building of his intention to do work, &c., before commencing it, are repealed by the act of 1843, (Acts 1842-3, 83,) so far as St. Louis county is concerned. This last act is specially applicable to St. Louis county, and is not repealed by the general law of 1845. (R. S. 1845, 733.) *Speilman v. Shook*, xi. 340.

9. But it is necessary to give notice to the owner after the work is done. *Urin v. Waugh*, xi. 412.

10. On *scire facias*, to enforce a mechanic's lien against the contractor who

erected the building on which the lien is claimed, and also against the owner of it, the contractor cannot attack the validity of the lien on the ground that no notice was given to the owner within thirty days after the debt accrued, as required by statute, (Acts 1842-3, 83, § 3,) where that objection is not raised by the owner himself. *Clark v. Brown*, xxii. 140.

11. Under the statute, (Acts 1842-3, 83, § 3,) notice of a claim of lien for materials furnished, given more than thirty days after the indebtedness accrues, is insufficient, although such notice may have been given within thirty days after the completion of the building. *Scott, J., dis. Patrick v. Ballentine*, xxii. 143.

12. The notice referred to in the St. Louis act (Acts 1842-3, 83, § 3,) is required only of sub-contractors. *Squires v. Fithian*, xxvii. 134.

C. FILING LIEN.

13. Under the statute, (See Acts 1842-3, 83—R. S. 1845, 733,) a person furnishing materials for a building in the county of St. Louis, under a contract with the owner, is bound to file his lien within six months from the time his demand accrues, in order to charge the building with a lien. *Schulenberg v. Gibson*, xv. 281. *Wibbing v. Powers*, xxv. 599.

14. Where the contract for the building of a house is incomplete, the work being prosecuted from time to time, as materials are provided or as the progress of other work may require, the mechanic is not required to file his lien within six months of the completion of each detached piece of work, but within six months after the completion of the contract. *Squires v. Fithian*, xxvii. 134.

See SUPRA, 6-7.

D. THE DEMAND.

15. Under the statute relating to mechanics' liens, if a person, who claims to have a lien upon a building, combines in his demand any services for which he might have a lien with other charges for which no lien is given, so that they cannot be separated, the whole benefit of the act will be lost. *Edgar v. Salisbury*, xvii. 271.

16. A charge of commission for services in paying for labor and materials used in erecting buildings, do not come within the letter or spirit of the law. *Ibid.*

17. Where a builder contracts to build a house, he cannot have a lien for services rendered in superintending his own workmen. *Blakey v. Blakey*, xxvii. 39.

E. SCIRE FACIAS.

18. Coverture is a good plea in bar to a *scire facias* on a mechanic's lien. *Sibley v. Casey*, vi. 164.

19. Under the act of 1843, relating to mechanics' liens in the city and county of St. Louis, (Acts 1842-3, 84, § 8,) a *scire facias* on such lien can only issue from the Circuit Court. The Court of Common Pleas has no jurisdiction of that matter. *Gaty v. Brown*, xi. 138. *Hammond v. Barnum*, xiii. 325.

20. The new code does not abolish the proceeding by *scire facias* to enforce a mechanic's lien. *Doellner v. Rogers*, xvi. 340.

21. The mechanics' lien law of 1845, (R. S. 1845, '735, §§ 7, 8,) regulated proceedings in St. Louis county to enforce a mechanic's lien in cases where the materials were furnished, or the work performed under a contract with the owner. *Clark v. Brown*, xxv. 559.

22. Where the owner of a building, upon which there is a mechanic's lien for materials furnished under a contract with himself, conveys the premises to a purchaser before the institution of a suit to enforce the lien, no judgment can be rendered in a suit to enforce the lien, commenced by *scire facias*, unless the purchaser be made a party to the record; nor if, in such case, suit be brought in the ordinary form against the vendor, could an execution issue against the property, unless a *scire facias* should have first issued and been served upon such purchaser. *Ibid.*

23. A material man instituted suit by *scire facias*, under the statute (R. S. 1845, '735, § 8,) to enforce a lien, and made the contractor and the owner of the building parties, and then dismissed the proceeding as to the former—*Held*, that there was no party left on the record to defend the suit, and that the cause could not proceed against the owner of the building alone. *Wibbing v. Powers*, xxv. 599. See ACTION, 50.

f. PLEADING.

24. Under the statute relating to mechanics' liens, (R. S. 1835, 108, § 2,) the account of the party's demand, when filed, becomes a part of the record, and stands in the place of a declaration. *Cornelius v. Grant*, viii. 59.

25. It is not necessary, under the statute, (R. S. 1845, '735, § 7,) that the petition for the enforcement of a mechanic's lien, should contain a prayer for a special execution against the property charged with the lien; if the account filed with the petition and referred to therein corresponds with that filed as the claim for lien, it sufficiently appears that the object is the enforcement of the lien. *Johnson v. McHenry*, xxvii. 264.

g. EVIDENCE.

26. The account of the plaintiff's demand, filed according to the provisions of the statute, is evidence of the lien. The abstract to be made by the clerk, under § 3 is not the primary evidence thereof, and the omission of the clerk to make it, does not affect the lien. (R. S. 1835, 108.) *Cornelius v. Grant*, viii. 59.

27. In proceedings to enforce a mechanic's lien the defendant cannot give evidence of a special contract by the plaintiff with other persons at the same time, and for like work, at a much less price. But he may give evidence of the general price of such work at the time the contract was made on the work done. *Ibid.*

h. JUDGMENT.

28. Although, in a suit instituted to enforce a mechanic's lien, the plaintiff may fail to show the existence of a lien in his favor, he will be entitled, if the

pleadings and evidence will warrant it, to a general judgment. *Patrick v. Abeles*, xxvii. 184.

i. EXECUTION.

29. On a judgment under the statute, (R. S. 1825, 195, § 3,) the execution can issue only against such property, charged with the lien, as the defendant owned at the time the suit was commenced. *Milam v. Bruffee*, vi. 635.

30. Under the statute relating to mechanics' liens in the city and county of St. Louis, (Acts 1842-3, 84, § 7,) where the lien is filed and a judgment obtained before a Justice, the Clerk of the Circuit Court can issue an execution without a return of *nulla bona* on an execution issued by the Justice. *Illingworth v. Miltenberger*, xi. 80.

j. COSTS.

31. The proceeding by *scire facias* on a mechanic's lien must be in the court where the lien is filed, and the plaintiff is entitled to his costs, although the amount recovered is within the jurisdiction of a Justice. *Albers v. Eilers*, xviii. 279.

32. But the act of 1847, concerning "costs," (Acts 1846-7, 15,) is applicable to an ordinary suit upon a mechanics' lien, and the plaintiff, who commences his suit in a court of general jurisdiction, and only recovers an amount within the jurisdiction of a Justice, is not entitled to his costs, unless the case is within the exceptions of the act. *Ibid.*

See RAILROADS, I.

MERCHANTS AND GROCERS.

1. In an indictment under the act imposing a tax on vendors of merchandise, (R. S. 1825, 531, § 2,) it is not necessary to charge that the merchandise was sold by retail, and not in the original packages. *Tracy v. The State*, iii. 3.

2. An indictment under § 2 of the act of February 6, 1837, (Acts 1836-7, 64,) charged that the defendant "did sell, retail and deliver ten pounds of nails," &c., "without a grocer's license"—*Held*, that the indictment was defective in not following the words of the statute and charging that the defendant "dealt in the selling," &c., and that the articles sold were "goods, wares and merchandise not the growth and manufacture of this State." *The State v. Hunter*, v. 360.

3. And so of an indictment framed under the act to license and tax merchants. (R. S. 1835, 403.) *The State v. Martin*, v. 361.

4. The statute relating to merchants and grocers (Acts 1852-3, 111,) authorized the granting of licenses to grocers for one year. And the statute of 1855, (R. S. 1855, 1077, § 22,) did not affect grocers' licenses previously granted. The

act of 1855, applies only to licenses granted after May 1st, 1856. *The State v. Andrews*, xxvi. 171.

5. Goods imported into this State from a foreign country, may be sold by the importer in the original package without his first taking out a license; and a State law requiring him to pay a license for the sale of such goods in the original package, would be in conflict with the constitution of the United States, which prohibits a State from laying any imposts, &c., (Art. I, § 10,) and also with the clause which declares that Congress shall have power to regulate commerce, &c. (Art. I, § 8.) *The State v. Shapleigh*, xxvii. 344. [See *Brown v. Maryland*, 12 *Wheaton*, 419.] *The State v. North*, xxvii. 464.

6. The act of 1855, (R. S. 1855, 1072,) does not require the importer to take out a license to authorize him to sell the same in the original package. *Ibid*.

See LAWS 42; 71, 72.

MILLS AND MILLDAMS.

1. The verdict of a jury on a writ of *ad quod damnum*, may be objected to by any person who may consider himself injured by the building of the proposed dam, and the court is bound to hear the testimony offered. (R. S. 1835, 407, § 13.) *Groce v. Zumwalt*, iv. 567.

2. H. and S., under the statute, (R. S. 1835, 405,) separately petitioned for leave to erect different dams, about a mile and a half apart, on the same river. The jury assessed the damages on H.'s petition at ten dollars, for flowage, and nothing on S.'s. It appeared that in the building of S.'s dam the height granted by the court would flow the water back in the channel of the river and injure the site of H.—*Held*, per TOMPKINS, J., that the law does not take notice of injuries occasioned by the deepening of water in the channel of a stream, and that the court properly exercised its discretion in granting S.'s petition and refusing that of H. NAPTON, J., absent, and M'GIBB, J., *dis*. *Hook v. Smith*, vi. 225.

3. The obstruction or diversion of a private water course is, at common law, a private nuisance, and the statute (R. S. 1835, 408, § 23,) declaring such obstruction or diversion a public nuisance, is merely cumulative, and does not affect the remedy at common law. *Welton v. Martin*, vii. 307.

4. The complainant filed his bill in equity, therein charging that the defendants, by erecting a dam across the stream below the complainant's mill, had caused the water to flow back upon the complainant's mill and machinery, thereby rendering them of little value, and praying for an injunction—*Held*, that the bill did not state a case which would warrant the exercise of the restricting powers of a court of equity by injunction. *Ibid*.

5. The statute relating to mills and mill dams (R. S. 1845, 747, § 25,) gives a remedy only in cases in which a mill, or other machinery, or a dam erected in

pursuance of the act, was injured by the subsequent erection of a dam or other obstruction, also erected under the provisions of said act. *Arnold v. Klepper*, xxiv. 273.

6. And where the obstruction complained of was not erected under the provisions of the statute, the party may have redress by means of a suit for damages, or by injunction; but before he can have relief in the latter form, he must establish his right by a recovery in an action at law. *Ibid.*

MILLS AND MILLERS.

1. In a proceeding to recover a forfeiture for not setting up rates of toll, it is competent for the plaintiff to show that he had suffered loss by the neglect, although the forfeiture is definitely fixed by statute. *Spencer v. Medder*, v. 458.

2. And in such proceeding before a Justice, it is not necessary to file a statement of the cause of action. *Ibid.*

MORTGAGE.

I. SEALING.

II. CONSTRUCTION, AND HEREIN OF WHAT IS AND WHAT IS NOT A MORTGAGE.

III. RIGHTS AND INTERESTS OF PARTIES.

IV. ASSIGNMENT.

V. APPLICATION OF RENTS AND PROFITS.

VI. SATISFACTION.

VII. FORECLOSURE.

VIII. SCIRE FACIAS.

IX. SALE.

X. REDEMPTION.

XI. MORTGAGE OF PERSONALTY.

I. SEALING.

1. Where a deed of mortgage purports to have been executed by two or more persons, with but one seal, a demurrer will not lie for that cause, and it can only be taken advantage of by plea of *non est factum*. *Hughes v. Tong*, i. 389.

II. CONSTRUCTION, AND HEREIN OF WHAT IS AND WHAT IS NOT A MORTGAGE.

2. A deed conveying lands and containing a condition that it should be absolute upon the payment of certain notes executed by the grantee to the grantor, otherwise to be null and void, is a mortgage. *Carr v. Holbrook*, i. 240.

3. An instrument executed as a security for a debt, although technically defective as a mortgage in law, may nevertheless be good in equity; and a purchaser, with notice thereof, will not hold against the prior equitable mortgagee. *Davis v. Clay*, ii. 161.

4. W. sold and delivered to R. a chattel, and gave him an absolute bill of sale of it; but, at the same time, took from R. a defeasance by which it was provided that the chattel might be redeemed by W., on the payment of a certain sum in a specified time—*Held*, to be a mortgage, and not a pledge, and that, at law, the title vested absolutely in R., upon failure to pay within the time limited. *Williams v. Rorer*, vii. 556.

5. An understanding between vendor and vendee, entered into at the time of the sale of land, (being by parol, under which possession was taken,) that if, within a given time, the former should pay to the latter the purchase money, with interest, then the latter would re-convey to the former, constitutes the transaction a mortgage. *Tibeau v. Tibeau*, xxii. 77.

6. A., in the year 1819, to secure the repayment of a loan of money, executed an instrument in the French language in the form of a French hypothecation, and containing the words "*obligé, engagé, aliéné, affecté et hypothéqué*"—*Held*, that this was a mortgage within the meaning of the act of October, 1807. (1 Ter. L., 182.) *McNair v. Lott*, xxv. 182.

7. A judgment was rendered in 1829, in favor of one A., against B. An execution was issued and levied on certain real estate of B., and A. became the purchaser, and received the sheriff's deed. A second execution was issued and levied upon certain other real estate of B. On the day of sale under this execution, A. executed and delivered to B. this writing: "The understanding between B. and myself is that on the payment of my debt due me from said B., I am to reconvey all the property already purchased at sheriff's sale, and am also to purchase in the property to be sold this day by the sheriff, which is also to be reconveyed to B. on the payment and full satisfaction of my debt due as aforesaid. March 31, 1831." A., in pursuance of said agreement, purchased in the various tracts of land advertised to be sold—*Held*, that under all the circumstances of the case, the lapse of time, the acts of the parties, the insolvency of B., from before the date of these transactions until his death in 1846 or 1847, the issuing with his knowledge of other executions and the levying of them upon other lands of his, the little value of the lands purchased at the dates of the levies and sales, the fact that they were largely incumbered and were held for the most part under adverse titles—that the above agreement should be construed as a mere temporary privilege or indulgence granted to B., and that A. could not be regarded as holding the lands under it by way of mortgage. *Price v. Evans*, xxvi. 30.

8. Where the form of a written conveyance leaves it doubtful whether it was intended as a conditional sale, or a mere security, resort may be had to the circumstances surrounding the transaction to show the intention of the parties; and where, in such a case, the intention is still left in doubt, courts of equity incline to construe the conveyance as a mortgage. *TOMPKINS, J., dis. Desloge v. Ranger*, vii. 327.

9. It is not sufficient to make a sale, purporting to be absolute, a mortgage, that the party executing it considered it as such; it must be so considered and intended by all the parties thereto. *Holmes v. Fresh*, ix. 200.

10. A., having mortgaged land to B., conveyed the same to C., subject to the mortgage, and then conveyed the same land to B. in fee, and B. entered satisfaction of the mortgage—*Held*, that the legal estate which was vested in A. by the satisfaction of the mortgage reverted to and vested in C., the first purchaser, and that the fact that B. released the mortgage in consideration of the conveyance from A., made no difference. *White v. Todd*, x. 189.

11. It is not competent at law to show that a deed, absolute on its face, is in fact a mortgage. *Hogel v. Lindell*, x. 483.

12. A debtor by note in the sum of \$300 conveyed a lot of land to his creditor at the price of \$1000; the note of \$300 not being at hand at the time of the transaction, the debtor gave another note of \$260, and the creditor gave to the debtor at the same time a note for \$440, the three notes thus amounting to the price of the land—*Held*, that this was not sufficient to show that the deed was intended as a mortgage. *Edwards v. Ferguson*, xiv. 469.

13. Where the intention of the parties is doubtful, in determining whether the transaction is a mortgage or a conditional sale, the court will hold it a mortgage, as that construction is the more just and equitable. And in ascertaining the intention of the parties, the court will not only look to the deeds and writings but to all the circumstances of the contract. *Brant v. Robertson*, xvi. 129.

14. No conveyance can be a mortgage unless it is made to secure the payment of a debt, or the performance of a duty, either existing at the time the conveyance is made, or to be created, or to arise in the future. But it is not necessary that the debt or duty should be evidenced by a separate written instrument. *Ibid*.

15. A mortgage with power of sale provided that the money arising from a sale should be applied to the payment of the debts mentioned in the deed, and the surplus, if any, should be paid to the grantor or his order. At the foot of the deed was this memorandum, proved to have been made before execution at the request of the grantor: "I also owe P. F. \$400, and A. K. \$200, with interest, which are to be paid and made liens with the above"—*Held*, that the memorandum was to be taken as part of the deed, and had the effect to make the demands of P. F. and A. K. liens upon the surplus. *Doniphan v. Paxton*, xix. 288.

16. And where P. F. proved an indebtedness to the amount secured by the deed, and claimed nothing more in a controversy between him and a subsequent incumbrancer—*Held*, that it was immaterial whether the note presented by him as evidence of the debt imported on its face a valuable consideration or a mere gratuity. *Ibid*.

17. A conveyance of property as security for the payment of money is a redeemable mortgage, no matter what the parties intend in reference to the right of redemption, or whether the conveyance appears on the face of it to be a mortgage. *Wilson v. Drumrite*, xxi. 325.

See SALE, I, 13.

III. RIGHTS AND INTEREST OF PARTIES.

18. The mortgagee has never been considered within the rule which forbids trustees and those having a fiduciary or confidential character from purchasing estates with whose disposition they have been intrusted. *McNair v. Biddle*, viii. 257.

19. A mortgagee may become the purchaser of the equity of redemption directly from the mortgagor, or may purchase the property under a decree of foreclosure and sale. *Ibid.*

20. A party may purchase land under a sale on a mortgage to himself to secure a debt due to him. *Cooley v. Rankin*, xi. 642.

21. The maker of a note secured by mortgage cannot, as against a third party owning the equity of redemption, increase the charge upon the land by confessing a judgment, and thus compounding the interest. *McGready v. McGready*, xvii. 597.

IV. ASSIGNMENT.

22. The assignee of a debt secured by mortgage may compel a sale of the mortgaged premises in satisfaction of the debt, by proceedings in chancery. The mortgage passes as an incident to the debt, and an assignment of it need not be under seal. *Laberge v. Chauvin*, ii. 179. *Crinion v. Nelson*, vii. 466.

23. An assignment of a mortgage without an assignment of the debt it was intended to secure, is a nullity. *Thayer v. Campbell*, ix. 277.

V. APPLICATION OF RENTS AND PROFITS.

24. Where a mortgagee takes possession of the mortgaged premises, the rents and profits of the land are to be applied to the payment of both the principal and interest of the debt, and not to the payment of the interest alone. The mortgagee is a mere trustee and can make no profit out of the estate. *Walton v. Withington*, ix. 545. See INFRA, 69.

VI. SATISFACTION.

25. The conveyance of land by a trustee to a mortgagee vests the entire legal ownership in him, and the subsequent satisfaction of the mortgage extinguishes

that incumbrance on the title for the benefit of whoever is the owner of it. *Gale v. Mensing*, xx. 461.

26. A mortgagee, for indemnity, purchased at a sheriff's sale the equity of redemption of the land mortgaged to him, and paid the debt he was bound as surety to pay. Having refused, on request, to acknowledge satisfaction of the mortgage on the record, the mortgagor instituted a suit for the penalty under the statute, (R. S. 1845, 752, § 23,)—*Held*, that he was not entitled to recover. *Phelps v. Relfe*, xx. 479.

27. Under the statute, (R. S. 1835, 410, § 13,) a mortgagee might, through an attorney in fact, acknowledge satisfaction of a mortgage on the margin of the record, and it was not necessary that such acknowledgment should be under seal, or that the agent should be authorized by instrument under seal. *Valle v. American Iron Mountain Co.*, xxvii. 455.

28. Such an entry, except in giving notice, occupies no higher ground than an unrecorded release, and a direct proceeding to set it aside is not necessary. *Ibid.*

29. It was not necessary under the act of 1835, in order to authorize an acknowledgment of satisfaction of a mortgage on the margin of the record, that there should have been actual payment in money of the mortgage debt. It was sufficient that there was "full satisfaction" of the mortgage. *Ibid.*

30. In a statutory proceeding to foreclose a mortgage, where the defendant sets up as a bar to the action an acknowledgment of satisfaction on the margin of the record, the plaintiff may show in rebuttal that such acknowledgment was procured by fraud. *Ibid.*

VII. FORECLOSURE.

31. Proceedings under the act of October 20, 1807, (1 Ter. L. 182,) instituted to foreclose a mortgage, are proceedings at common law, and not governed by rules in chancery. *Carr v. Holbrook*, i. 240.

32. The State can foreclose a mortgage given by the defendant for money borrowed at the Loan Office, under the act of June 27, 1821, (1 Ter. L. 760.) *Ravenscroft v. The State*, i. 536.

33. Under the statute of 1825, (p. 593,) in proceedings to foreclose a mortgage, it was not necessary to make subsequent mortgagees or incumbrancers parties thereto, or to give them notice thereof. *Mullanphy v. Simpson*, iii. 492. *Russell v. Mullanphy*, iii. 492. (But it is otherwise by the revised statutes of 1855, 1089, § 7.)

34. The act of 1807, which directs the "mortgagor, his heirs or representatives," to be summoned to appear, &c., (1 Ter. L. 182, § 1,) intended to embrace only those to whom the land would descend, or those who represented the personal fund out of which the redemption money would come, and does not require the mortgagee to notify subsequent incumbrancers. *Mullanphy v. Simpson*, and *Russell v. Mullanphy*, iv. 319. (But it is otherwise by the R. S. 1855, 1089, § 7.)

35. In proceedings under the statute relating to mortgages, (R. S. 1825, 593,)

all persons interested in the mortgaged property may join in the petition for foreclosure. *Milam v. Bruffee*, vi. 635.

36. A mortgage given to secure separate debts due to several persons, conveys a general interest and right of action in each, and may be proceeded on by any one without joining the others. *Thayer v. Campbell*, ix. 277.

37. One of several mortgagees cannot make the other mortgagees defendants, but they may come in and make themselves defendants. (See R. S. 1835, 409, § 6.) *Ibid.*

38. A proceeding to foreclose the equity of redemption of a mortgagor, under the statute, is a proceeding at law, and is not governed by the rules of equity. (See Acts 1838-9, 87, § 13.) *Ibid.*

39. Upon a petition to foreclose a mortgage, all the pleas having been overruled or stricken out, the court should have entered judgment for want of a plea, and assessed the damages immediately, when the damages are liquidated. *Boyd v. Holmes*, ix. 711.

40. A judgment of foreclosure against a mortgagor who was dead at the commencement of the suit, is void. *Bollinger v. Chouteau*, xx. 89.

41. If a subsequent incumbrancer is not made a party to a proceeding to foreclose, it will not defeat the action, but he still retains his right to redeem. *Valentine v. Havener*, xx. 133.

42. In a suit to foreclose a mortgage of an undivided interest in real estate, it is not proper to make a sheriff, who has made a partition sale of the land since the date of the mortgage, a co-defendant, for the purpose of obtaining an order upon him to pay over to the mortgagee the mortgagor's portion of the proceeds. *Schneider v. Staihr*, xx. 269.

43. The lien of a mortgage is not merged in a judgment obtained in a proceeding to foreclose. *Riley v. McCord*, xxi. 285.

44. The personal representative of a mortgagor is a necessary party to a suit to foreclose a mortgage. *Miles v. Smith*, xxii. 502.

45. Although a judgment at law may have been obtained for the mortgage debt, the mortgagee may foreclose the mortgage. *Thornton v. Pigg*, xxiv. 249.

46. The wife is not a necessary party to proceedings to foreclose a mortgage, although she joined in the mortgage. *Ibid.*

47. Although a petition for a foreclosure of a mortgage may be addressed to the Judge "in chancery sitting," and the petitioner styled "your orator," and it is prayed that "a writ of subpoena issue," yet if, in accordance with a prayer of the petition, a judgment is rendered that the equity of redemption be foreclosed, and the mortgaged premises sold, &c., the proceeding will be regarded as a statutory proceeding. *Riley v. McCord*, xxiv. 265.

48. A judgment of foreclosure, and that the mortgaged premises be sold, &c., obtained in a proceeding under the statute, (R. S. 1845, 749, § 1,) may be revived in the name of the administrator of the mortgagee against the administrator of the mortgagor, and that, too, although this judgment of foreclosure was obtained by the mortgagee as trustee of a third person. *Ibid.*

49. In proceedings instituted under the statute, (R. S. 1845, 749, § 1,) to foreclose a mortgage, the administrator of the mortgagor was the only necessary

party, his heirs were not necessary parties in such action. *Perkins v. Woods*, xxvii. 547.

50. A mortgagee is not bound to notice the partition of the mortgaged premises in a suit instituted for that purpose. If, however, in a partition suit, in which he is a party defendant in right of his wife, he should set up his mortgage, and an issue joined with respect to the existence of the mortgage should be determined against him, he would, it seems, be bound by the judgment. If no more appears from the record than that the mortgage was set up by the mortgagee, that issue was taken as to its existence, and that no notice was taken of the mortgage in the interlocutory or final judgments, the record would furnish only *prima facie* evidence that the question of the existence of the mortgage was passed upon; it might be shown by parol evidence that the question was never actually submitted to or passed upon by the court. *Hull v. Lyon*, xxvii. 570.

51. Where, during the pending of a suit to foreclose a mortgage, third persons become interested in the premises by purchase, it is not necessary, in order to authorize a decree against them in respect of the interest acquired by them, to make them parties to the suit; they may be made defendants on their own motion under the statute, (R. S. 1855, 1089, § 6.) *Ibid.*

52. An action to foreclose a mortgage, given to secure a promissory note, is not an action founded on a bond bill or note within the statute, (R. S. 1855, 1280, § 11,) consequently an interlocutory judgment rendered therein at the return term, cannot be proceeded on to final judgment at such return term. *Doan v. Holly*, xxvi. 186.

See ERROR, 7;...JURISDICTION, 20;...LIMITATIONS, 65;...SCIRE FACIAS, 6;
SUPRA, 30.

VIII. SCIRE FACIAS.

53. After judgment of foreclosure of a mortgage, it is too late to urge against the revival of the judgment by *scire facias* that the mortgage was voluntary. *Riley v. McCord*, xxiv. 265.

IX. SALE.

54. Where the proceeds of a sale of mortgaged property are insufficient to pay the mortgage debt, the debtor is personally liable for the unpaid balance. *Scott v. Jackson*, ii. 104.

55. Where a mortgagee, after taking the necessary steps pointed out by our statute, forecloses a mortgage, a purchaser under the foreclosure takes the title, divested of all rights and interests derived from the mortgagor subsequent to the mortgage. *Mullanphy v. Simpson*, and *Russell v. Mullanphy*, iv. 319.

56. A deed of mortgage, with a power of sale in the mortgagee, is valid, and a sale under it, made in pursuance of the power, vests a valid title in the purchaser. *NAPTON, J., dis. Carson v. Blakey*, vi. 273. *Destrehan v. Scudder*, xi. 484.

57. Where a mortgage creditor, under the act relating to mortgages, sells the entire mortgaged premises in satisfaction of a part of his debt, he cannot afterwards sell the same land, in the hands of a purchaser, to satisfy the unpaid balance of his mortgage debt, which was not matured at the first sale. *Buford v. Smith*, vii. 489.

58. Property was sold under a judgment of foreclosure—*Held*, that the title of the purchaser could not be disputed upon the ground that the instrument foreclosed was not an ordinary mortgage, and that the judgment was erroneous. *Miles v. Davis*, xix. 408.

59. Where there was a recorded mortgage with a power of sale, and an unrecorded agreement between the parties thereto, that the sale should be deferred in consideration of the payment of interest—*Held*, that an innocent purchaser at the sale under the mortgage deed was not affected by the unrecorded agreement. *Beatie v. Butler*, xxi. 313.

60. Where property was advertised to be sold under a power of sale in a mortgage, at "the town of St. Joseph," which town was small, and nearly all the business was done on or near the spot where the sale really took place, and there was no sacrifice of the property proved to have grown out of the vagueness of the description, it was *held*, that the place of the sale was sufficiently described. *Ibid*.

61. The death of the mortgagor does not suspend the operation of the power of sale given in the mortgage. *Ibid*.

62. The possession of the mortgagor or his tenant, is in no way notice to a purchaser of an existing agreement between the mortgagor and mortgagee, by which the latter defers the time of taking possession, and proceeding to act under the power of sale. *Ibid*.

See LIEN, 14.

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X. REDEMPTION.

63. A court of equity will permit a subsequent mortgagee or his assignee to redeem, on application for that purpose. *Mullanphy v. Simpson*, iii. 492. *Russell v. Mullanphy*, iii. 492.

64. Subsequent incumbrancers cannot be permitted to redeem a part of the mortgaged premises without paying the prior incumbrancer his whole demand. *Mullanphy v. Simpson*, and *Russell v. Mullanphy*, iv. 319.

65. January 26, 1820, McN. mortgaged to M. certain premises to secure to him a debt of five thousand five hundred dollars. On the 30th November thereafter, he executed a further mortgage to M. on the same premises, to secure the further sum of five hundred dollars. On the 17th April, 1821, he executed a third mortgage to M. on certain other premises, to secure the further sum of three thousand nine hundred and fifty-one dollars. In 1824, M. obtained a judgment against McN., on the debt of five thousand and five hundred dollars, for the amount thereof, on which execution issued, and the sheriff sold thereupon all the land mentioned in the first mortgage, and also all the land mentioned in the third mortgage, situated in St. Louis County, all of which, except one lot,

was bought in by M. for twenty-seven hundred dollars, who then took and thereafter retained possession of the property. After the sale, M. filed his petition to foreclose the third mortgage, and obtained a decree thereon, that unless McN. paid the mortgage debt within a limited time, the mortgaged premises should be sold, &c. No steps were taken under this decree. The heirs of McN. filed their bill to redeem the premises embraced in the several mortgages—*Held, First*, that the equity of redemption of mortgaged premises could be sold on execution as well before as after the revision of 1825. (See 1 Ter. L. 120, §§ 42, 45.) *Second*, that where a mortgagee obtains a judgment at law on his mortgage debt, he cannot sell the equity of redemption under an execution issued on such judgment, and therefore that the sale on M.'s execution was void, and the heirs of McN. were entitled to redeem the estate embraced in the first mortgage. *TOMPKINS, J., dis.* *Third*, that the proceedings by M. to foreclose under the third mortgage constituted an admission, on his part, of a right of redemption in the mortgagor in the premises embraced in that mortgage. *TOMPKINS, J., dis. McNair v. O'Fallon*, viii. 188.

66. In 1819, B. mortgaged the lot in question to M., who obtained a judgment of foreclosure in 1824, upon which no execution was issued. A few days after the judgment, M. signed a writing, to the effect that he would convey to B. a certain lot whenever B. redeemed the mortgage. In 1827, M. purchased B.'s equity of redemption in the mortgaged lot at sheriff's sale, under a judgment against him, in favor of the Bank of Missouri. In 1837, B. filed his bill to redeem the lot, upon the ground that the sale, in 1827, was illegal and void, and that the writing signed by M., in 1824, gave him an indefinite time for redemption—*Held*, that the sale of the equity of redemption was valid, and that the purchase by M. was independent of the judgment of foreclosure and the subsequent agreement, and could not be affected thereby; and that the interest of B. in the mortgaged lot continued to be an equity of redemption, until the sale of the equity in 1827. *Benton v. O'Fallon*, viii. 650.

67. In a suit by the mortgagor to redeem, against a mortgagee in possession, the latter must be allowed for all permanent and useful improvements, deducting rents and profits, and for all taxes paid. *Bollinger v. Chouteau*, xx. 89.

68. A mortgagee, against whom suit is brought to redeem, cannot defend upon the ground of the staleness of the claim, unless the facts would constitute a bar in equity. *Ibid.*

69. All rents and profits received by the mortgagee in possession, must be accounted for. *Anthony v. Rogers*, xx. 281.

70. Where a mortgagee obtains a judgment for his debt, and purchases the mortgaged premises at an execution sale, he will still hold them subject to redemption. *Thornton v. Pigg*, xxiv. 249.

See LIMITATIONS, 32, 64.

XI. MORTGAGE OF PERSONALTY.

71. Until conferred by express statute, the courts of this State had no jurisdiction to foreclose mortgages of personal property. *O'Fallon v. Elliott*, i. 364.

72. Where a mortgagor of personal property, left in possession thereof, is, before the time of payment arrives, about to remove the property out of the county, or beyond the jurisdiction of the court, a court of chancery has jurisdiction to cause it to be seized and detained. *Berry v. Burckhardt*, i. 418.

73. A mortgagee of personal property is, after the day of redemption is passed, regarded in law as the absolute owner, and may dispose of the property in any manner he pleases. *Robinson v. Campbell*, viii. 365. *Robertson v. Campbell*, viii. 615. See SUPRA, 4.

See ESTOPPEL, 27 ; . . . REPLEVIN, 13 ; . . . WITNESS, 79.

NEW TRIAL.

I. MOTIONS FOR.

- a. GENERALLY.
- b. WHEN TO BE MADE.
- c. AFFIDAVIT.
- d. SECOND AND SUBSEQUENT NEW TRIALS.

II. ALLOWANCE GENERALLY AND EFFECT.

III. GROUNDS FOR.

- a. GENERALLY.
- b. SURPRISE AND MISTAKE.
- c. NEWLY DISCOVERED EVIDENCE.
- d. VERDICT AGAINST EVIDENCE.
- e. AGAINST LAW.
- f. AGAINST INSTRUCTIONS.
- g. EXCESSIVE DAMAGES.
- h. MISBEHAVIOR OF JURY.
- i. ABSENCE OF WITNESS.

I. MOTIONS FOR.

a. GENERALLY.

1. Where a motion for a new trial resting on untenable ground is overruled, the judgment will not be reversed, although there would have been error if the motion had been put on another ground and overruled. *Chamberlain v. Smith*, i. 718.

2. Questions in relation to the correctness of the proceedings on the trial of a cause must be raised by a motion for a new trial, and those relating to the sufficiency of the pleadings, by a motion in arrest of judgment. *Warner v. Morin*, xiii. 455.

3. Neither the action of the court in giving or refusing instructions, or admitting or excluding evidence, nor of the jury, or the court sitting as a jury, in finding a verdict, will be reviewed, unless the points respectively are presented

to the court below in a motion for a new trial. *Polk v. The State*, iv. 544. *Thompson v. Child*, vi. 162. *Higgins v. Breen*, ix. 493. *Floersh v. Bank of Missouri*, x. 515. *Rhodes v. White*, xi. 623. *Pogue v. The State*, xiii. 444. *Vivion v. Lafayette County*, xiii. 453.

4. Nor will a judgment rendered upon an insufficient publication, be disturbed unless a motion to set it aside was made in the court below. *Woods v. Mosier*, xxii. 335.

5. And unless the action of the court below in giving or refusing instructions, or in admitting or rejecting evidence, be excepted to, its action upon those questions cannot be brought into question by a motion for a new trial. *Floersh v. Bank of Missouri*, x. 515. *Gordon v. Gordon*, xiii. 215.

6. The correctness of the action of the court below, in giving or refusing instructions, will be reviewed, although not made a ground of error in a motion for a new trial. The propriety of this change of practice is the stronger, from the fact that the court has declined considering motions for new trials, when they rest upon the question of the verdict being against the evidence, or the weight of evidence. *Fine v. Rogers*, xv. 315.

7. A motion for a new trial, or a review, is not necessary where the court improperly refuses to hear any evidence in support of a demand against an estate. *Coots v. Morgan*, xxiv. 522.

8. Since the enactment of the practice act of 1849 a case will be reversed for error committed in the progress of a trial, and duly excepted to, although not embraced in a motion for a new trial. *Wagner v. Jacoby*, xxvi. 530.

9. In order to authorize the Supreme Court to reverse a judgment in a case commenced before a Justice, for want of jurisdiction, it must appear that the question of jurisdiction was raised and passed upon in the Circuit Court, and this is sufficiently shown by a motion for a review in which the objection is made, although a motion for a review is not applicable in such a case. *Batchelor v. Bess*, xxii. 402.

b. WHEN TO BE MADE.

10. A motion for a new trial cannot be entertained after the lapse of four days from the trial, (See R. S. 1835, 469, § 1,) but the court has the power to grant a new trial, on suggestion, if it see cause, after the expiration of that time. *TOMPKINS, J., dis.* *Williams v. St. Louis Circuit Court*, v. 248.

11. It is not error to refuse a new trial where the motion is submitted more than four days after the trial. *Allen v. Brown*, v. 323.

12. An application for a review and new trial under the new code, must be made at the term at which the trial took place. *Honey v. Honey*, xviii. 466.

See PRACTICE, 328.

c. AFFIDAVIT.

13. In a motion for a new trial the affidavit of the applicant must allege that the verdict of the jury is unjust and that he has merits. *Meechum v. Judy*, iv. 361.

14. An affidavit, on a motion for a new trial should contain a positive averment of merits. *Elliott v. Leak*, iv. 540.

15. On a motion for a new trial the affidavit of newly discovered testimony must aver due diligence. *Smith v. Matthews*, vi. 600.

16. An affidavit for a new trial, on the ground of the absence of a witness, must show the facts to be proved by such witness. *Warren v. Ritter*, xi. 354.

17. On motion for a new trial on the ground of newly discovered testimony the affidavit of the party to the suit is not sufficient; the affidavit of the new witness must be produced or its absence accounted for. *Boggs v. Lynch*, xxii. 563.

18. An application for a new trial on the ground of newly discovered evidence should, as a general rule, be accompanied by the affidavit of the party seeking it; the affidavit of a third person should not be received without an explanation of the reason why the party himself omitted to make it. *The State v. McLaughlin*, xxvii. 111.

d. SECOND AND SUBSEQUENT NEW TRIALS.

19. Only one new trial can be granted to either party, unless for misconduct in the jury, or error committed by them in regard to a question of law. (R. S. 1825, 632, § 41.) *Hill v. Wilkins*, iv. 86. *Hill v. Deaver*, vii. 57. *Dickey v. Malechi*, vi. 177. *Humbert v. Eckert*, vii. 259.

20. And a second new trial will not be granted unless the question of law, in regard to which the jury is claimed to have erred, is presented on the record. *Hill v. Wilkins*, iv. 86.

21. The statute directing that a second new trial shall not be granted to the same party, except where the triers of the fact shall have erred in a matter of law, or when the jury shall be guilty of misbehaviour, (R. S. 1845, 830, § 3,) is only applicable to cases where the law has been correctly expounded to the jury. *Boyce v. Smith*, xvi. 317.

22. Where a second new trial has been improperly granted, that matter can only be corrected by a *mandamus* from the Supreme Court. *Ibid.*

23. Where a new trial has been refused, the Supreme Court, on appeal or writ of error, will look into the record, and if it finds that the law was incorrectly given to the jury, will reverse the judgment and award a new trial, without regard to the number of new trials previously granted to the party. *Boyce v. Smith*, xvi. 317. *Harrison v. Cachelin*, xxiii. 117. *Burns v. Hayden*, xxiv. 215.

II. ALLOWANCE GENERALLY AND EFFECT.

24. The action of the court in granting or refusing a new trial is subject to be reviewed by the Supreme Court. *Valois v. Warner*, i. 730. *Hill v. Wilkins*, iv. 86.

25. A new trial will not be awarded where it is evident that the party can derive no benefit from it. *Ferguson v. Turner*, vii. 497.

26. Where several are joined as defendants in trespass and some are acquitted and others found guilty, the latter may move for a new trial without joining the former; and the verdict as to those found guilty may be set aside, without affecting the verdict as to the others. *Brown v. Burrus*, viii. 26.

27. If the court err as a jury, the mode of redress is by asking for a new trial, —if as a court, it should be clearly shown to this court that the point of law was decided. *Davis v. Scripps*, ii. 187.

28. The granting of a new trial impliedly sets aside the prior judgment on the verdict. *Lane v. Kingsberry*, xi. 402.

29. The enumeration of causes for which a new trial may be granted, in the last clause of § 3, Art. XI of the practice act of 1849, does not exclude other causes as a ground for the exercise of that power. *Fine v. Rogers*, xv. 315.

III. GROUNDS FOR.

a. GENERALLY.

30. Where a party was aware of the existence of testimony and of its materiality previous to the trial and had made no exertion to procure it, but proceeded to trial, without even moving for a continuance, he cannot obtain a new trial on his stating that he was unable to procure the testimony in time for the trial. *JONES, J., dis. Hanly v. Blanton*, i. 49.

31. The omission of the plaintiff to state in a declaration in assumpsit, his excuse for not performing part of the agreement sued on is not sufficient ground for a new trial, such imperfection being cured by verdict. (See R. S. 1835, 468, § 7.) *Helm v. Wilson*, iv. 481.

32. Leave of court, extending the time of replying to a set-off, where it works no injury to the opposite party and does not affect the merits, although supported by no good reason, is not sufficient cause for a reversal of the judgment. *Beach v. Curle*, xv. 105.

33. A new trial will not be granted because a deposition was sent to the jury by the court, at their request, where the court instructed the jury that parts of the deposition, which had been ruled out, were no evidence in the cause, no exception having been taken to the action of the court at the time, and it not appearing that the evidence ruled out was of a character to abuse the minds of the jury, even had they read it. *Foster v. McO'Blenis*, xviii. 88.

34. The rejection by the court of a competent juror is not ground for a new trial, there being no valid objection to the juror empaneled. *West v. Forrest*, xxii. 344.

35. Where a cause is set for trial, and the defendant by agreement of plaintiff is allowed until the day of trial to file his answer, it is not erroneous to refuse to set aside a judgment by default against him for want of an answer, where the reason urged for setting aside the same is, that the defendant and his counsel were, during the day on which the case was set for trial, in attendance in another court, the one as witness, the other as counsel, in a cause there on trial. *Boernstein v. Heinrichs*, xxiv. 26.

36. Where a cause, by consent of parties, is set for trial on a day in the return term, and the same is tried in the absence of the defendant, and judgment rendered against him, he is precluded from insisting, in support of a motion to set aside the judgment, that the cause was not triable of right at the return term. *Boernstein v. Heinrichs*, xxiv. 27.

37. Where a cause is, upon the day of trial, submitted to the court, the defendant is not entitled to have judgment set aside for the reason that his counsel was, at the time, absent in attendance as counsel in another court. *Jacob v. McLean*, xxiv. 40.

38. Where, during the pendency of a motion for a new trial on the ground that the verdict was against the weight of evidence, the cause was removed to another circuit by act of the legislature transferring the county in which it was tried to such other circuit, the judge should not refuse to grant a new trial on the ground that he had not had the opportunity which the jury had of deciding upon the credibility of the witnesses. If embarrassed from such cause, the court should grant a new trial. *Woolfolk v. Tate*, xxv. 597.

b. SURPRISE AND MISTAKE.

39. It is no ground for granting a new trial that the party was "surprised by the cause coming on sooner than he expected." *Stout v. Calver*, vi. 254.

40. Nor is it any ground for a new trial that the attorney was mistaken as to the time of the meeting of the court, and was therefore not present. *Steigers v. Darby*, viii. 679.

41. Or that the party was surprised in a matter of law. *Hite v. Lenhart*, vii. 22.

42. Or that a party had authorized his attorney to accept an offer of compromise, and supposed that he had done so, and so gave the suit no further attention. *Patchin v. Wegman*, xix. 151.

43. Nor will a new trial be granted on the ground of surprise in the testimony of a witness of the opposite party, in relation to a particular fact, when the party must have been aware that the witness would be called for the purpose of proving that fact, as when a notary is called to prove due notice of the dishonor of a bill. *Shepard v. Citizens' Ins. Co.*, viii. 272.

44. Nor on the ground that the party was mistaken as to the nature of his case, or as to what the witnesses would testify. *Robbins v. Alton Ins. Co.*, xii. 380.

45. Surprise at a trial is no ground of relief, in a court of equity, upon a bill for a new trial. *Honey v. Honey*, xviii. 466.

46. The unexpected close of plaintiff's case is no ground for granting a new trial on motion of defendant. *Wells v. Sanger*, xxi. 354.

c. NEWLY DISCOVERED EVIDENCE.

47. Newly discovered evidence which is merely cumulative is no ground for a new trial. *Beauchamp v. Sconce*, xii. 57. *The State v. Larrimore*, xx. 425.

Wells v. Sanger, xxi. 354. *The State v. Stumbo*, xxvi. 306. *The State v. Wightman*, xxvii. 121.

48. Nor is newly discovered evidence, tending merely to discredit a witness, ground for granting a new trial. *Deer v. The State*, xiv. 348.

49. If a new trial be sought on the ground of newly discovered evidence, it ought to appear not only that such evidence is material, but that it is of such a character that it would, if introduced, probably produce a different result. *The State v. Locke*, xxvi. 603.

d. VERDICT AGAINST EVIDENCE.

50. The Supreme Court will not reverse a judgment of the court below, refusing a new trial, when the evidence in the cause would warrant a finding by the jury either way. *McKnight v. Wells*, i. 13. *Singleton v. Mann*, iii. 464. *Rennick v. Walton*, vii. 292.

51. Nor unless the evidence strongly preponderates against the verdict. *Oldham v. Henderson*, iv. 295. *Mulliken v. Greer*, v. 489. *Shobe v. Morris*, vi. 489. *Dooly v. Jinnings*, vi. 61. *Campbell v. Hood*, vi. 211. *Lackey v. Lane*, vii. 220. *Henry v. Forbes*, vii. 455. *Tiffin v. Forrester*, viii. 642. *Williams v. The State*, ix. 268. *Robbins v. Alton Ins. Co.*, xii. 380.

52. Where the plaintiff had a verdict, on proof of acknowledgments by the defendant that he "got two hundred dollars from the plaintiff," that "he had never denied it," and that "the two hundred dollars were just, but that he did not receive the ten dollars"—*Held*, that there was no error in overruling a motion for a new trial. *Elliott v. Leake*, v. 208.

53. Where the verdict is clearly against the evidence, the judgment will be reversed, although no instructions were asked. *Hartt v. Leavenworth*, xi. 629. See, *per contra*, *Wilson v. Burks*, viii. 446.

54. Cases where the judgment was reversed for not granting a new trial where the verdict was against the weight of evidence. *Clemens v. Laveille*, iv. 80. *Scott v. Brockway*, vii. 61. *Bybee v. Kinote*, vi. 53.

55. The Supreme Court will not interfere with the verdict of a jury on the ground that the evidence does not support the verdict. *The State v. Anderson*, xix. 241.

56. Yet in severe cases, under the operation of this rule, it must be satisfied that the instructions given for the successful party are entirely unexceptionable. *Carroll v. Paul*, xvi. 226.

57. Although there may be nothing in the record to impeach the veracity of a witness, and the verdict be against his evidence, still it will not be set aside by the appellate court if it be manifest that the issue was properly understood by the jury. *McAfee v. Ryan*, xi. 364.

58. Where the error complained of in the verdict of the jury, or the judgment of the court sitting as a jury, consists in the finding of facts not warranted by the testimony, this court cannot correct it. The remedy is for the party to move for a new trial, and except to the judgment of the court overruling the motion. *Brun v. Dumay*, ii. 125. *Montgomery v. Blair*, ii. 189.

e. AGAINST LAW.

59. Where the plaintiff recovered a judgment founded in part upon a betting contract, it was reversed, and a new trial granted. *Sisk v. Evans*, viii. 52.

60. Where the measure of damages is fixed by law, and the verdict is obviously the result of a mistaken view of the rules of law applicable to the facts in evidence, the verdict will be set aside. *Todd v. Boone County*, viii. 431. *Fulkerson v. Bollinger*, ix. 828.

f. AGAINST INSTRUCTIONS.

61. Where the court gives irrelevant or erroneous instructions, and the verdict of the jury is against them, but in accordance with the law applicable to the facts of the case, a new trial should not be awarded. *Pratte v. Judge Court Common Pleas*, xii. 194.

g. EXCESSIVE DAMAGES.

62. In an action of assumpsit for goods sold, where the verdict of the jury was for two hundred and thirty dollars, the testimony showing sales only to the amount of one hundred and thirty dollars, and the receipt of considerable sums of money by the defendant from the plaintiff, a new trial should have been granted, there being no money count in the declaration. *Baldridge v. Bryan*, iii. 371.

63. Where the damages awarded by the jury are excessive and unwarranted, the Supreme Court will award a new trial. *Pratt v. Blakey*, v. 205. *Goetz v. Ambts*, xxii. 170.

64. The Supreme Court will not reverse a judgment for damages unless they are obviously excessive. *Woodson v. Scott*, xx. 272. *Barth v. Merritt*, xx. 567. *Wells v. Sanger*, xxi. 354.

65. The Supreme Court will not interfere with the finding of the facts by the lower court, unless it is clearly wrong. *Conrad v. Belt*, xxii. 166.

h. MISBEHAVIOR OF JURY.

66. The mere separation of a jury, where there is no ground for suspicion that they have been tampered with, is no cause for a new trial. *The State v. Barton*, xix. 227. *The State v. Harlow*, xxi. 446. *The State v. Igo*, xxi. 459.

i. ABSENCE OF WITNESS.

67. Where a witness is summoned and attends court a part of the term, and then absents himself without leave, and the party relying upon his testimony neglects to demand an attachment, a new trial will not be granted on the ground of the absence of the witness. *Stewart v. Small*, v. 525.

See CRIMINAL LAW, 354-357;...ERROR, 8;...JUSTICE OF THE PEACE, 34, 35;...PRACTICE IN SUPREME COURT.

NOTARY PUBLIC.

1. A notary public, being an officer authorized to take depositions, has authority under the statute (R. S. 1845, 1088, § 8,) to commit a witness for refusing to answer any questions other than those which it is his personal privilege to refuse to answer. *Ex parte McKee*, xviii. 599.

2. But a notary public has no power to commit a witness for refusing to produce books and papers under a subpoena *duces tecum*. *Ex parte Mallinkrodt*, xx. 493.

NUISANCE.

1. Where an individual is damaged by a public nuisance, he has the same remedy as when injured by a private nuisance. *Per Scott, J. Welton v. Martin*, vii. 307.

2. In an action for a private nuisance, it is not necessary to allege or prove any special damages; but in a private action for a public nuisance, special damages must be averred and proved. *Smith v. McConathy*, xi. 517.

3. In an action for a nuisance, evidence cannot be given of injuries other than those alleged in the declaration. *Ibid*.

4. What constitutes a nuisance is a question of law. *Ibid*.

5. A distillery with styes, in which large quantities of hogs are kept, the offal from which renders the waters of a creek unwholesome, and the vapors from which render a dwelling uninhabitable, is a nuisance. *Ibid*.

See CHANCERY, 70.

OFFICER.

1. That a grantor, in 1769, made two grants of land on the same day, one of which was afterwards confirmed by the Government of the United States, is not sufficient evidence that he was, at the time, an officer of the French or Spanish governments, and invested with power to make such grants. *Hill v. Wright*, iii. 243.

2. By the customs of this territory while under Spanish rule, the Lieutenant Governor had a right to authorize a deputy to discharge his judicial duties. *McNair v. Hunt*, v. 300.

3. Where a person gives a bond for the faithful discharge of the duties of an

office, he thereby admits the appointment to the office so far as to make himself liable for official neglect or misconduct. *Barada v. Inhabitants of Carondelet*, viii. 644.

4. The judicial act of ministerial officers are not judgments, from which there is no relief but by appeal, writ of error, &c. They are only acts which cannot be performed by deputy. *Lewis v. Lewis*, ix. 182.

5. A statute specifying the time within which a public officer must perform an official act regarding the rights or duties of another, is directory merely, unless the nature of the act or the words of the statute show that it was intended to be a limitation of power. *St. Louis County Court v. Sparks*, x. 117.

6. The appointment of a person to an office who has not the necessary qualifications, is not void. He is, *de facto*, an officer, and his acts, until his removal, are valid. *Ibid.*

7. A public officer is not personally liable on a contract made in his official capacity. *Tutt v. Hobbs*, xvii. 486.

8. A person appointed city counselor by a municipal corporation has no such vested right in his office as that an ordinance abolishing it would be void as impairing the obligation of a contract. *Primm v. City of Carondelet*, xxiii. 22.

See CLERK OF COURT, 3; . . . CONSIDERATION, 4; . . . CONSTABLE; . . . HABEAS CORPUS, 7; . . . QUO WARRANTO; . . . REVENUE, 6; . . . ST. LOUIS, XV.

PARDON.

1. The pardoning power belongs exclusively to the executive of this State, and cannot be exercised by the legislature. *The State v. Sloss*, xxv. 291. *The State v. Todd*, xxvi. 175. See LAWS, 66.

PARENT AND CHILD.

- I. PARENT'S RIGHTS AND LIABILITIES.
- II. ACTION FOR POSSESSION OF CHILD.
- III. FURNISHING CHILD WITH NECESSARIES.
- IV. CHILD'S SERVICES AND LIABILITY.

I. PARENT'S RIGHTS AND LIABILITIES.

1. The father, as natural guardian of his child, has no right to control or dispose of the property of the child derived from any other person than the father, until he has given bond with security. *McCarty v. Rountree*, xix. 345.

2. A father is not responsible for injuries caused by an assault made by his minor child. *Baker v. Haldeman*, xxiv. 219.

3. Where minors sue by their father as natural guardian, and seek thereby to have a new trustee appointed in the place of the one to whom certain slaves had been devised in trust for them, on the ground of the failure to act—*Held*, that, although it did not appear from the petition that the father had given bond as guardian, a demurrer on the ground that no guardian had been appointed according to law, was improperly sustained. *Temple v. Price*, xxiv. 288.

II. ACTION FOR POSSESSION OF CHILD.

4. No action at law can be maintained by a parent for the possession of his child; if the child is unlawfully restrained of his liberty, a writ of *habeas corpus* furnishes the proper remedy. *Dowling v. Todd*, xxvi. 267.

III. FURNISHING CHILD WITH NECESSARIES.

5. The law presumes that a minor is supplied with necessities by his parent, so long as he continues to live with him. *Perrin v. Wilson*, x. 451.

6. A minor cannot become liable for necessities so long as they are supplied to him by his parent. *Ibid*.

7. Articles of dress and ornament, although such as are generally worn by minors of like condition, are not necessities. *Ibid*.

8. Where articles are furnished to a minor while he continues to live with his parent, it is at the peril of the party furnishing them, since he must show that they were necessities, or neither the minor nor the parent will be liable. *Ibid*.

IV. CHILD'S SERVICES AND LIABILITY.

9. Where a step-son continues to reside in the family of his step-father after coming of age, as before, the law will not imply a contract to pay him for any services rendered. *Guenther v. Birkicht*, xxii. 439.

10. At law there will be no implication of a promise on the part of a step-daughter to pay her step-father for necessities furnished her during her minority. *Gillett v. Camp*, xxvii. 541. See SUPRA, 6, 8; . . . ADMINISTRATION, 80.

See ADMINISTRATION, 116, 117; . . . PRACTICE, 222.

PARTITION.

I. BY ACT OF THE PARTIES.

II. BY ACTION AT LAW.

- a. WHEN MAINTAINABLE.
 - b. PARTIES TO ACTION.
 - c. PLEADING AND PRACTICE.
 - d. PROCESS.
 - e. EVIDENCE.
 - f. NON-SUIT.
 - g. MODE OF PARTITION.
 - h. SALE.
 - i. VALIDITY OF JUDGMENT.
 - j. CORRECTION OF MISTAKE.
 - k. JURISDICTION.
 - l. IMPROVEMENTS.
-

I. BY ACT OF THE PARTIES.

1. Where a will requires an appraisement of land, and directs that a partition of it be made among the children, agreeably to the appraisement, without going into a court of law, the children will be entitled to partition, although the executor has failed to cause a division as required in the will. *Chouteau v. Paul*, iii. 260.

2. A voluntary agreement by heirs for a partition can confer no jurisdiction on the court to make a partition; nor will the subsequent ratification by the parties impart any validity to the proceedings as a judicial act. *Bempart v. Rederman*, xxiv. 385.

3. A voluntary partition without the sanction of court will be binding where the parties are all *sui juris* and bind themselves by a proper agreement. *Ibid.*

4. A parol partition, followed up by possession, will be valid and sufficient to sever the possession, where there is a title, and it is admitted to be in common. *Ibid.*

II. BY ACTION AT LAW.

a. WHEN MAINTAINABLE.

6. Where one is in possession of land, asserting an exclusive title, an action for partition cannot be maintained against him by one out of possession, who claims a common title thereto; the claimant must first establish his title in an action of ejectment. *Lambert v. Blumenthal*, xxvi. 471.

7. Where a tenant in common in lands conveys his share to one of his co-tenants, he cannot have the same partitioned and set apart to him for any purpose. *King v. Howard*, xxvii. 21.

b. PARTIES TO ACTION.

8. Where one-half of an estate is devised to the widow and the other half to the children of the testator, the widow may join a portion of the children against the others in a petition for partition to obtain an allotment of her share. *Chouteau v. Paul*, iii. 260.

9. Because all interested do not join in a motion to set aside a partition sale, is no reason why the motion should not be heard. *Neal v. Stone*, xx. 294.

10. An infant may be made a party plaintiff in a statutory proceeding for partition. [OVERRULING *Johnson v. Noble*, xxiv. 252.] *Thornton v. Thornton*, xxvii. 302, *Scott, J., dis.*

c. PLEADING AND PRACTICE.

11. In petition for partition the interest of all the claimants should be alleged and proved. *Millington v. Millington*, vii. 446.

12. A suit for partition is not triable at the return term, except by consent of parties. *Smith v. Davis*, xxvii. 298. *Thornton v. Thornton*, xxvii. 302.

13. In an action for partition the plaintiff alleged that himself and defendant were joint owners of a certain tract of land; that they were "equal partners" in the same; that the said tract had been divided into town lots, a part of which had been sold; that the residue of the lots were the joint property of the plaintiff and defendant; and prayed for partition of said remaining lots. The court sustained a demurrer to this petition—*Held*, that the demurrer was improperly sustained; that, if the plaintiff and defendant held the land as partners, and the affairs of the partnership were unadjusted, the land being chargeable with debts of the firm or with a balance due the defendant, this matter should be set up in an answer; that no such defense being interposed, the partition might be made of the lots remaining unsold. *Holmes v. McGee*, xxvii. 597.

d. PROCESS.

14. Under the statute relating to partition, (R. S. 1825, 609,) notice by publication to non-resident minor defendantss was unnecessary, where the court appointed a guardian *ad litem*, who appeared and answered the plaintiff's petition. And under that act the guardian *ad litem* had power to consent to a private instead of a public sale. *Hite v. Thompson*, xviii. 461.

15. Where, in a suit for partition, there is filed a paper as follows: "October 6th, 1854—We wish to waive the notice of the division of the real estate belonging to the heirs of R. F. A., deceased; [signed,] S. C. and M. A."—*Held*, that this did not amount to a service on, nor an appearance by, the signers, and that a judgment by default against them was irregular and should be set aside. *Anderson v. Anderson*, xxiii. 379.

16. In a suit for partition, commenced by suing out a writ of summons against the defendants upon a petition filed in the clerk's office, the writ of summons should be served upon the minor defendants; it is not necessary that service should be made upon the guardian. *Smith v. Davis*, xxvii. 298.

e. EVIDENCE.

17. On petition for partition, the plaintiff must show in himself a legal title to the premises sought to be divided. *McCabe v. Hunter*, vii. 355.

18. The record of a suit of partition between parties representing themselves as the heirs of a person, is evidence of the partition, but not of the heirships, which must be established by evidence *aliunde*. *Archer v. Bacon*, xii. 149.

f. NON-SUIT.

19. In partition, the plaintiff may, at any time before the cause is submitted to the court on the question of confirming the report of the commissioners, take a non-suit. *Ivory v. Delore*, xxvi. 505.

g. MODE OF PARTITION.

20. In a suit for partition of land, where the commissioners appointed by the court, have made their report assigning to each claimant his portion of the land divided, the court has no right to amend and correct the report by making an assignment of the lots different from that made by the commissioners. *Murphy v. Murphy*, i. 741. *George v. Murphy*, i. 777.

21. Such a partition by the court is wholly void. *George v. Murphy*, i. 777.

22. Nor has the court the right to cast lots to determine which lots the different claimants shall have. *Murphy v. Murphy*, i. 741.

23. If the court find the partition, as made by the commissioners, to be unequal, unlawful, or contrary to this order, they should send it back to the commissioners with such instructions as might meet the justice of the case. *Ibid.*

h. SALE.

24. A purchaser at a sale, under an order made in proceedings for partition, cannot avoid the payment of the purchase money upon the ground of a failure of title. Such sales are at the risk of the purchaser. *Owsley v. Smith*, xiv. 153. *Schwartz v. Dryden*, xxv. 572, SCOTT, J., *dis.* And see *Picot v. Page*, xxvi. 398.

25. Lands may be subdivided for purposes of sale in an action for partition, as well as for partition in kind. *Wainwright v. Rowland*, xxv. 53.

26. Where, in a sale in partition, the land embraced in the suit is bid off by one of the parties to the proceeding, the purchaser cannot, by any agreement with any of the parties to the suit with respect to the land and the payment of the purchase money, affect the right of the sheriff to collect his lawful fees, or enough of the purchase money to pay the costs, and that portion of the purchase money belonging to those parties who did not enter into an agreement in the nature of a release with the purchaser. *Wiley v. Robert*, xxvii. 388.

See DOWER, 35; . . . SALE, 22, 23.

i. VALIDITY OF JUDGMENT.

27. The judgment of the Circuit Court, in a suit for partition of land, will not be reversed in a collateral proceeding. *Waddingham v. Gamble*, iv. 465.

See SUPRA, 15.

j. CORRECTION OF MISTAKE.

28. A. died possessed of numerous lots and parcels of land; a partial partition, embracing a portion of said lots, was made, and a lot that had been sold and conveyed by A. in his lifetime, was assigned to B., one of the representatives of A., by mistake and in ignorance on the part of all the parties to the partition, that it had been so conveyed by A. Subsequent proceedings were instituted to obtain partition of the balance of A.'s estate—*Held*, that B. would be entitled to have this mistake corrected; that this correction might be made by taking the value of the lot into estimation in determining the share to be assigned to B. in the lots embraced in the second partition, and that the value of the lot thus to be taken into consideration is, its value at the time of its allotment in the first partition. *Smith v. Sweringen*, xxvi. 551.

29. This equity in favor of B. did not cease at his death, it will pass by a devise by B., of all his property, including the lands embraced in the second partition. *Scott, J., dis. Ibid.*

k. JURISDICTION.

30. The Circuit Court has not jurisdiction to make partition of real estate situated in another county, unless it is divided by the county line, or all the parties in interest are adults, and parties to the partition. *Yount v. Yount*, xv. 383.

l. IMPROVEMENTS.

31. The statutory mode of partition does not divest courts of chancery of their jurisdiction of the subject. A plaintiff in a suit for partition may claim such a division of the land as that he will receive the benefit of or compensation for, improvements made by him before partition; and where partition is made, and he does not object to the commissioners report, he cannot afterwards maintain a suit to recover compensation for his improvements. *Spitts v. Wells*, xviii. 468.

32. A. instituted a suit to enforce specific performance of an agreement to convey an undivided interest in certain premises, claiming, also, compensation for improvements made by him, with the consent of the vendor. The court rendered a decree vesting in A. an undivided interest of one-half, but allowing no compensation for improvements—*Held*, that he would not be entitled, in a suit for partition, to have allotted to himself that portion of said premises upon which said improvements had been made, or to have compensation made therefor. *Wainwright v. Rowland*, xxv. 53. See APPEAL, 7.

See CHANCERY, 71;....COSTS, 36, 37;....ERROR, 26;....HUSBAND AND WIFE, 60;....WILL, 15.

PARTNERSHIP.

- I. WHAT CONSTITUTES A PARTNERSHIP.
 - II. PROOF OF PARTNERSHIP.
 - III. RIGHTS AND LIABILITIES.
 - a. GENERALLY.
 - b. WHEN FIRM IS BOUND OR NOT BY ACTS OF MEMBERS.
 - c. RIGHTS AND REMEDIES BETWEEN PARTNERS.
 - IV. SETTLEMENT BETWEEN PARTNERS.
 - V. ACTION BY AND AGAINST.
 - VI. DISSOLUTION, AND ITS CONSEQUENCES.
-

I. WHAT CONSTITUTES A PARTNERSHIP.

1. An agreement by which one is to furnish a circular saw-mill and hands and stock to saw, and another is to furnish logs and feed for the hands and stock, and the lumber to be divided equally between them, does not constitute a partnership. *Stoallings v. Baker*, xv. 481.

2. The receipt of a share of the profits of a concern does not necessarily create a partnership in the stock in trade as between the parties. *McCauley v. Cleveland*, xxi. 438.

II. PROOF OF PARTNERSHIP.

3. The declarations and admissions of parties, are sufficient evidence of a partnership, where the only evidence to rebut it is of a negative character. *King v. Ham*, iv. 275.

4. In a suit by a stranger against several defendants, charging them as partners, a less degree of evidence will establish the partnership than is required in suits by parties suing as partners, since persons may be liable to those with whom they deal as partners, when they are not in fact partners as between themselves. *Campbell v. Hood*, vi. 211.

5. The plaintiffs, suing as partners, cannot establish the fact of the partnership by evidence of the common understanding of the neighborhood. *Lockridge v. Wilson*, vii. 560.

6. The fact that notes had been paid to a firm, in which the individual names of the members of the firm were set out, and the declarations of the members as to who constituted the firm, made prior to the institution of a suit, is evidence, for the firm, to prove the partnership. *Woods v. Quarles*, x. 170.

7. A person who holds himself out as a partner, is liable as such, and the allegation in a petition that he was a partner, is sustained by proof that he so held himself out. *Rippey v. Evans*, xxii. 157.

See EVIDENCE, 92-99.

III. RIGHTS AND LIABILITIES.

a. GENERALLY.

8. Where parties enter into articles of co-partnership for a definite period, and in pursuance thereof enter upon business, they are liable as partners to third persons until due notice of dissolution is given. *Thurston v. Perkins*, vii. 29.

9. The statute making all contracts which, by the common law, were joint only, joint and several, (R. S. 1845, 216, § 1,) does not affect the rule of law governing the liabilities of partnerships. Hence, a note given by the individual members of a firm for the sole use of one of them, is not to be treated as a partnership debt, and will not in equity be allowed against the property of an insolvent firm, to the prejudice of the creditors of the firm. *Burns v. Mason*, xi. 469.

10. Private stipulations between partners do not affect the public or those who deal with them, without notice of their agreement. *Cargill v. Corby*, xv. 425.

11. Partnership effects, transferred by one partner in fraud of his co-partners, will be held by third persons, who receive them with information of the fraud, or without consideration, as trustees for the benefit of the firm. *Croughton v. Forrest*, xvii. 131.

12. There were three successive partnerships, the first composed of two persons, A. & B., and styled A. & B.; the second of three persons, A., B. and C., and styled A., B. & Co.; the third of two persons, A. and B., and styled A. & B. But A., in the third firm, was not the same person, but had the same name as A. in the first and second firms. B. was in all the three firms. B. gave a note by the name of the first and third firms, A. & B.—*Held*, that the note was *prima facie* the note of the firm existing when the note was given, and so not binding on A. of the first firm; but if it was in fact given on account of the first firm to a customer without notice, A. of the first firm would be bound; and the court remanded the cause to be tried again. *Pomeroy v. Coons*, xx. 598.

13. A. and H. entered into an agreement whereby A. leased to H. a certain lot of land, on which the former was to make improvements at once, and the latter might add others from the profits of the concern, if both parties agreed thereto. H. was to manage the concern and give A. half the net profits, and to render A. liable for no sum over \$100, without his consent. H. purchased materials to fit up the buildings exceeding \$100, and A. was held liable therefor as partner. *Brownlee v. Allen*, xxi. 123. *Morgan v. Allen*, xxi. 127.

14. Persons may be held liable as partners to third parties, though not in fact partners as between themselves. *Young v. Smith*, xxv. 341.

b. WHEN FIRM IS BOUND OR NOT BY ACTS OF MEMBERS.

15. H., a member of a firm, borrowed money of W., on his own responsibility, without saying anything about the existence of the firm of which he was a partner, and the money borrowed was applied to the payment of debts of firm—*Held*, that H. alone is responsible, and not the firm. *Wiggins v. Hammond*, i. 121.

16. Where a member of a firm borrows money on the credit of the partnership, the firm is liable for it, unless it appears that the transaction was out of the

ordinary course of business of the firm, or that the lender knew, or had reason to believe, that the money was for the private use of the borrower. *Bascom v. Young*, vii. 1.

17. A promissory note given by one partner in the name of the firm, is, *prima facie*, binding upon all the partners; but if the note was given for an individual debt or any indebtedness foreign to the business of the partnership, the firm is not bound. The burden of proof is on the firm to show these facts. *Hickman v. Kunkle*, xxvii. 401.

18. Where goods purchased by one partner go into the partnership fund, his copartners are liable for the price, although the partnership was not known to the seller at the time of the sale. *Bracken v. March*, iv. 74.

19. One partner cannot bind another by deed, unless expressly authorized to do so by deed under seal. *Bentzen v. Zierlein*, iv. 417. *Henry County v. Gates*, xxvi. 315.

20. One partner cannot make a general assignment of the partnership effects in trust, for the benefit of creditors so as to bind the other; nor, *per* TOMPKINS, J., will such assignment have the effect to place the trustee in the position of the assigning partner. *Hughes v. Ellison*, v. 463.

21. *Quære*, whether it is necessary for a dormant partner to join in such assignment. It would seem that the dormant partner alone could complain of such assignment in which he did not join. *Drake v. Rogers*, vi. 317.

22. A firm is liable on an acceptance in its name, given by one of its members for his private use, where the fact of such use is not known to the drawee. *Potter v. Dillon*, vii. 228.

23. A firm is liable for lumber purchased by and charged to one of the partners, where it was purchased and used for the purposes of the partnership. *Braches v. Anderson*, xiv. 441.

24. The general authority of one partner to draw bills or promissory notes to charge another is an implied authority, and may be rebutted by notice of the absence of such authority. *Cargill v. Corby*, xv. 425.

25. The fact that a firm dealt in buying goods and selling them to Indians, in the Indian territory, does not of itself limit the powers of the partners, or require any evidence of usage or necessity in order to hold the partners liable on a partnership security. *Ibid.*

26. A person who is a member of two firms, gives the check of one firm to pay the note of the other, which had been deposited with a banker for collection. In this case, a mutual understanding between the firms may well be presumed, and the person receiving the proceeds of the note is not liable in an action by the former firm, to restore them. Nor is the notorious insolvency of the member who drew the note and the check, constructive notice of his want of authority. *Murphy v. Camden*, xviii. 122.

27. Where a bill is drawn by one firm in favor of its creditor upon another firm, and is accepted in the name of the firm drawn upon by a partner thereof, who is also a member of the drawing firm, a member of the firm drawn upon, although he may not be a member of the drawing firm, and may not have assented to the acceptance, will not, from these facts alone, be exonerated from

liability thereon. The acceptance *prima facie*, is on partnership account. *Tutt v. Addams*, xxiv. 186.

28. A bond executed by a partner in the name of the firm, and to pay a firm debt, will not bind his co-partner unless previously assented to or afterwards ratified, and such assent or ratification may be by parol. *Gwinn v. Rooker*, xxiv. 290.

29. Where one partner is authorized by his co-partner, by an instrument not under seal, to execute a note, and executes in the several name of himself and co-partner a sealed note or bond, no recovery can be had thereon against such co-partner, as upon a sealed instrument. It is not his deed. *Henry County v. Gates*, xxvi. 315.

30. The acts of a partner wholly outside the scope of the partnership business, and known to be so by the person dealing with such partner, are not binding on the other partners. In determining whether particular acts of a partner are within the scope of the partnership business and binding upon all the partners, if the partnership articles are not decisive of this question, the previous dealings and acts of the partners, and the length of time these acts have continued, may be considered. *Cayton v. Hardy*, xxvii. 536.

See EVIDENCE, 92-99.

C. RIGHTS AND REMEDIES BETWEEN PARTNERS.

31. B. and F. agreed to become equal partners in a government contract, and that the former should bid for it in their joint names. B. put in a bid accordingly, and obtained a contract, which he sold out at a profit—*Held*, that he was liable to F. for half the profit, and that F. might recover it in an action against B., in form *ex contractu*, as there was but one item in the account. *Byrd v. Fox*, viii. 574.

32. Where one of two partners pays to a creditor of the firm one-half the debt due from the firm, the partner so paying is not entitled to recover of the other the sum so paid, unless it appears, upon a final settlement of the affairs of the firm, that such sum is due to him. *Morin v. Martin*, xxv. 360.

See ACTION, 3 ; . . . INFRA, 35.

IV. SETTLEMENT BETWEEN PARTNERS.

33. A covenant between partners to divide the goods on hand on the happening of a particular event, and upon final settlement, either party falling in debt to the other should pay as therein stipulated, implies a covenant to make a final settlement, when such division is made. *Paul v. Edwards*, i. 30.

34. Bill in chancery to settle a partnership account extending through two partnerships. The answer alleged an account stated and settled of the affairs of the first partnership, to which there was a general replication. After a hearing, the court decreed that there had been a settlement of the first partnership. Afterwards the complainant moved for leave so to amend as to surcharge and

falsify the settlement, which was refused, and for this reason, the cause was remanded. *Boyle v. Hardy*, xxi. 62.

V. ACTION BY AND AGAINST.

35. Where the death of a partner prevents the partnership operations from being carried on according to the agreement, and money advanced from being refunded as stipulated, the surviving partner may recover for the money advanced, in the same manner as if no partnership had ever existed. *Biernan v. Braches*, xiv. 24.

36. Where one party makes a contract in his own name, though for the benefit of the firm of which he is a member, an action may be brought in his own name for a breach of it. *Taylor v. St. Bt. Robert Campbell*, xx. 254.

37. Where several partners jointly assume, one may be sued, and cannot plead in abatement the non-joinder of the others. *Oldham v. Henderson*, iv. 295.

38. In an action by an indorsee of a bill of exchange against the drawer, where the bill was endorsed by a firm, the testimony of a witness that he was well acquainted with the handwriting of one D., one of the members of the firm, and that the signature of the name of the firm, endorsed on the bill, was in D.'s handwriting, upon its being objected to the testimony that it did not appear that the firm mentioned in the bill of exchange and the deposition was the same mentioned in the declaration, it was *held*, that the testimony was admissible to prove that the endorsement made by D., in the name of the firm, was so made, and must be considered as the act of the firm. *Robinson v. Johnson*, i. 233.

39. In an action upon a note given by one partner in the name of the firm, evidence is admissible that the note was given in part for a debt not growing out of the partnership business, and that this fact was known to the plaintiff. *Klein v. Keyes*, xvii. 326.

40. The statute of 1839, (Acts 1838-9, 99, § 1,) which provides that in actions on contract, against several defendants, judgment may be taken against such of them as shall appear to be parties to the instrument sued on, applies to suits against partners. *Finney v. Allen*, vii. 416.

See ACTION, 2; . . . ASSUMPSIT, 31; . . . BONDS, NOTES AND ACCOUNTS, 74, 75; . . . EVIDENCE, 92-99; . . . JUSTICE OF THE PEACE, 18.

VI. DISSOLUTION AND ITS CONSEQUENCES.

41. One partner cannot, after the dissolution of the partnership, bind his co-partner by acknowledging an account. *Brady v. Hill*, i. 315.

42. After the dissolution of a firm, one partner cannot draw, indorse or accept bills so as to bind his co-partner without his consent. *McDaniel v. Wood*, vii. 543.

43. And where a note was indorsed to the firm in blank, one partner cannot, after dissolution, transfer the title to it by the delivery of such note to a party having knowledge of the other partner's objections to such transfer. *Ibid*.

44. A general authority to one partner to settle the business of a firm, after dissolution, does not authorize him to give a note in the name of the firm, for a firm debt, nor to renew an outstanding note. There must be a special authority in such a case, which may be by parol subsequent to the dissolution. *Long v. Story*, x. 636.

45. But to release the other partners, it must be shown that the payee had notice of the dissolution. *Ibid.*

46. The taking of a new note with surety from a partner for a partnership debt, after the dissolution of the partnership, does not *per se* discharge a retired partner. *Yarnell v. Anderson*, xiv. 619.

47. Goods were consigned to a firm, and previous to a sale the partnership was dissolved, and notice of the dissolution sent to the consignor, who recognized it and released the partner leaving, knowing that the business would be continued by the other partner—*Held*, that such verbal release of the parol contract before any breach thereof, was a good defense to an action for the goods. *Robinson v. McFaul*, xix. 549.

48. But in such a case, the mere fact that the consignor, after being notified by the retiring partner of the dissolution, suffers the goods to remain in possession of the other partner, is not sufficient to release the retiring partner from liability for the proceeds. *Holden v. McFaul*, xxi. 215. *Dean v. McFaul*, xxiii. 76.

49. A retired partner continues liable for debts contracted by the firm in favor of persons who had previously dealt with it and have not had notice of such retirement, and such notice to be effectual must be actual. Notice in a newspaper, though published in the usual manner, is not sufficient. *Pope v. Risley*, xxiii. 185.

50. Where a partnership is dissolved and a new firm is formed, the debts of the old firm may, by consent of the creditors, the old firm and the new, be transferred to the new firm and the old firm thereby be discharged. *Patterson v. Camden*, xxv. 13.

See ADMINISTRATION, XVI;....EXECUTION, 24, 25, 53;....JUDGMENT, 8;
PLEADING, 72, 73;....PRACTICE, 33;....SET-OFF, 1, 32, 33;....
WITNESS, 46, 87-90.

PATENT.

1. As to what is a useful invention. *Jolliffe v. Collins*, xxi. 338.

PAYMENT.

- I. WHAT CONSTITUTES PAYMENT.
- II. APPLICATION OF PAYMENTS.

I. WHAT CONSTITUTES PAYMENT.

1. Where a debt exists by simple contract, the taking a covenant bond, or other higher security, extinguishes the simple contract debt. *Bank of Missouri v. Tesson*, i. 617.

2. So, where a creditor takes from his debtor a higher security, as a specialty for a simple contract debt, such higher security is presumed to be an extinguishment of the original demand in the absence of all proof of intention on the subject. *Vaughn v. Lynn*, ix. 761.

3. But a bond given by one of two persons for a joint liability, will not extinguish a simple contract debt, unless given at the time the liability accrued, or was accepted in satisfaction of it. *Maddin v. Edmondson*, x. 643.

4. Where the bond of one of several joint debtors on simple contract is given for such joint debt, the joint debt is thereby satisfied, and the maker of the bond is the sole party liable. *Settle v. Davidson*, vii. 604.

5. Where the holder of a promissory note takes another and higher security for his debt, the note is merged in the security and cannot afterwards be recovered upon. *Hall v. Hopkins*, xiv. 450.

6. If a subsequent contract includes and goes beyond the terms of the first, the first is suspended, and no action can be maintained upon it. *Munford v. Wilson*, xv. 540.

7. Where defendant, owing plaintiff a certain sum, paid him, partly in cash and the rest in a debt due him from a third party, defendant is still liable if he does not do that which is necessary to transfer such interest in the debt to plaintiff as will enable him to claim it. *Coy v. De Witt*, xix. 322.

8. The plaintiffs received the note of a third party in settlement of a debt due them from defendant, but retained the evidence of the defendant's indebtedness—*Held*, that unless plaintiffs agreed to accept the third party's note in entire extinguishment of defendant's liability, defendant was still liable. *Appleton v. Kennon*, xix. 637. [See *Story Prom. Notes*, § 404.]

9. In order to constitute a payment, there must be both a delivery by the holder and an acceptance by the creditor, with the purpose on the part of the former to part with, and of the latter to accept of, the immediate ownership of the thing passed from the one to the other. *Thompson v. Kellogg*, xxiii. 281.

10. Part payment of a sum due is not a sufficient consideration to support a promise of forbearance as to the balance. *Price v. Cannon*, iii. 453.

11. A receipt given by a member of a firm in his own name is not necessarily evidence of a payment to the firm. *Reeves v. Hardy*, vii. 348.

II. APPLICATION OF PAYMENTS.

12. Where one has two demands against another, the debtor has a right to direct to which demand a payment he makes shall be applied. But if the debtor at the time of payment does not direct the application, the creditor may at any time apply it to which demand he pleases. *Brady v. Hill*, i. 315. *Middleton v. Frame*, xxi. 412.

13. One W. purchased of the plaintiff goods to the amount of \$617.35, and the defendant agreed in writing to pay, or see that W. paid, four hundred dollars of the amount within ninety days. W., within ninety days, paid two hundred dollars, and it was held that the payment extinguished the defendant's liability to that extent. *Eddy v. Sturgeon*, xv. 198.

14. A. executed a deed of trust on personal property to secure B., his indorser, on a note payable to C. Subsequently D. gave his note to C. for the same amount, under an agreement that the trust deed should be assigned to him, and A.'s note delivered to him. The deed was duly assigned to D., but B., to whom C. delivered the notes for D., refused to deliver them—*Held*, that the property should be applied to the payment of D.'s note, as against a person to whom A. subsequently mortgaged it. *Haven v. Foley*, xviii. 136.

15. In an action by a principal to recover the value of goods alleged to have been tortiously delivered by his factor to the defendant, a defense that the factor had accepted and paid a bill of the principal, drawn on account of the consignment, and exceeding in amount the value of the goods delivered to the defendant, and that there having been no appropriation of that payment by the parties, it ought to be appropriated to the satisfaction of the demand sued upon, will not be sustained. If both parties omit the application of payments, the law will apply them according to justice. *Benny v. Rhodes*, xviii. 147.

See LIMITATIONS, VII; . . . MORTGAGE, V; . . . REVENUE, 29-33.

P E D L E R S .

1. The statute in relation to pedlars, (R. S. 1835, 429, § 12,) makes it necessary to have a license to peddle clocks, whether manufactured in the State or not. *Page v. The State*, vi. 205.

2. An indictment for vending clocks without a license, (R. S. 1835, 429, § 12,) must allege a sale in the way of trade, but the person to whom sold and the price are immaterial. *Ibid*.

P E N A L T Y .

1. Where the defendant agreed to furnish the plaintiff with a certain amount of freight, and guaranteed sufficient water to go out of the river with his boat, having a load of four thousand bushels of wheat, on five and a half feet of water, provided the plaintiff should make the trip by a given day, and on the failure of any of the conditions to pay the plaintiff the full amount of freight at the stipula-

ted prices, and in default thereof to pay \$550—*Held*, that the \$550 was a penalty and not stipulated damages. *Gower v. Saltmarsh*, xi. 271.

2. As to the rule by which penalties are to be distinguished from liquidated damages. *Ibid*.

PERPETUATING TESTIMONY.

1. Where several persons unite in petition for a commission to perpetuate testimony, a verification of such petition by the affidavit of one of such petitioners is sufficient under the statute, (Acts 1850–1, 250, § 2.) *Tayon v. Hardman*, xxiii. 539.

PETITION IN DEBT.

I. WHEN IT LIES.

II. PLEADINGS, PRACTICE AND EVIDENCE.

I. WHEN IT LIES.

1. An administrator may sue under the act to simplify proceedings at law, (R. S. 1825, 620.) *Bailey v. Ormsby*, iii. 580.

2. But to do so he must set out his right to sue as administrator. *McGill v. Leduc*, iii. 398.

3. Petition in debt will not lie on a note which does not show when it became due. *Curle v. McNutt*, vi. 495.

4. Nor on a bond containing other stipulations than for the payment of money or property. *Curle v. Pettus*, vi. 497.

5. But is maintainable on a negotiable note by the holder against the maker. Sec. 7 of the act relating to bonds and notes, (R. S. 1835, 105,) does not apply to the form of the action. *Warne v. Hill*, vii. 40.

6. And lies on a negotiable note discounted by the Bank of Missouri. Sec. 29 of the bank charter, (Acts 1836–7, 19,) fixes the liability of the parties to notes there discounted, but does not limit the remedy upon them. *Nelson v. Bank of Missouri*, vii. 219.

7. So it lies on an obligation for the direct payment of money or property, although it contain some immaterial collateral obligation. (R. S. 1835, 449, § 1.) *Casey v. Barcroft*, v. 128.

8. Although a petition in debt cannot be maintained where an averment is

necessary to show the right of action, yet if an averment is made unnecessarily, it may be rejected and the petition sustained. *Middleton v. Atkins*, vii. 184.

9. Several notes may be joined in the same petition. *Jones v. Cox*, vii. 173.

10. Petition and summons, under the act of 1825 for the collection of debts, (R. S. 1825, 620,) does not lie on an account stated. *Wilson v. Turner*, iv. 274.

II. PLEADINGS, PRACTICE AND EVIDENCE.

11. Section 4 of the act of February 13, 1839, amending acts "regulating practice at law," (Acts 1838-9, 99,) does not apply to "petition in debt." *Southack v. Morris*, vi. 351.

12. Where the pleadings admit the bond sued on, the court will take the date set out in the petition as the true date of the bond, and cast interest accordingly. *Bentzen v. Zierlein*, iv. 417.

13. Where a note given in evidence varies from the one recited in the petition by the omission of the word "pay," *quære*, whether such variance is material. However this may be, an amendment is allowable. (R. S. 1835, 467.) *Atwood v. Gillespie*, iv. 423.

14. The objection that the instrument sued on in petition in debt, under the statute, (R. S. 1835, 449, § 3,) was not filed with the petition, is waived by pleading to the merits. *White v. Collier*, v. 82.

15. The statute does not require that the petition should be signed by the plaintiff or his attorney; and, if it did, that might be done at the return term, on leave of court, and would be no ground for a continuance. *Harvey v. Renfro*, vii. 187.

16. Where a note is payable to a firm, it need not be alleged that the note was executed to the payees by their firm name. [OVERRULES *Tabor v. Jameson*, v. 494. *Dyer v. Sublette*, vi. 14. *Dyer v. Field*, vi. 14.] *Lee v. Hunt*, vi. 163.

17. In petition in debt brought by an administrator on a note given to the intestate, but bearing date subsequent to the granting of letters of administration, it is not necessary to aver that the note was incorrectly dated. *Hamilton v. Stewart*, v. 266.

18. Non-assumpsit is not a good plea in an action of petition in debt. *Hoover v. Hays*, v. 125.

PHYSICIAN.

1. Under an indictment for practising medicine without a license, (See Acts 1846-7, 123,) the State must prove that the defendant did practice medicine for compensation and reward, but it is not necessary to prove the receipt of such compensation or reward. *The State v. Hale*, xv. 606.

See DRAMSHOPS, 9.

PLEADING.

I. DECLARATION.

- a. ALLEGATIONS AND AVERMENTS.
- b. SURPLUSAGE.
- c. JOINDER OF COUNTS.
- d. PROFERT.
- e. VENUE.

II. GENERAL RULES.

III. PLEA IN ABATEMENT.

IV. PLEAS IN BAR.

- a. GENERALLY.
- b. ACCORD AND SATISFACTION.
- c. FAILURE OF CONSIDERATION.
- d. FORMER RECOVERY.
- e. FRAUD.
- f. PLEA PUIS DARREIN CONTINUANCE.
- g. RELEASE.
- h. STATUTES AND RECORDS.
- i. STATUTE OF FRAUDS.
- j. VERIFICATION.

V. VARIANCE.

- a. BETWEEN THE WRIT AND DECLARATION, AND JUDGMENT AND VERDICT.
- b. BETWEEN THE JUDGMENT AND EXECUTION.
- c. BETWEEN EVIDENCE AND PLEADING.
 - aa. Generally.
 - bb. Judgments.
 - cc. Deeds.
 - dd. Slander.
 - ee. Misnomer.
 - ff. Petition and Summons.
 - gg. Recognizance.

VI. DEMURRER.

VII. OYER.

VIII. AIDER BY OYER, VERDICT AND JUDGMENT.

NEW SYSTEM.

I. PETITION.

- a. FORM AND SUFFICIENCY.
- b. ALLEGATIONS.
 - aa. Generally.
 - bb. Of Damages.
- c. VERIFICATION.
- d. FILING INSTRUMENTS WITH PLEADING.
- e. JOINDER OF CAUSES OF ACTION.

II. GENERAL RULES.

III. MOTIONS TO STRIKE OUT.

IV. ANSWER.

- a. LEAVE TO ANSWER AND TIME OF FILING.
- b. SUFFICIENCY.
- c. EQUITABLE DEFENSE.
- d. SETTLEMENT PUIS DARREIN CONTINUANCE.
- e. COUNTER CLAIM.
- f. WAIVER OF OBJECTION TO PETITION.
- g. VERIFICATION.

V. DEMURRER.

VI. VARIANCE.

- a. GENERALLY.
- b. FAILURE OF PROOF.

I. DECLARATION.

2. ALLEGATIONS AND AVERMENTS.

1. A declaration containing an averment that the note sued on was presented for payment on the day it became due, according to the tenor and effect thereof—viz: on the 17th day of July—the averment of the day under the *videlicet*, although repugnant to, does not vitiate the previous averment, which is good after verdict or on general demurrer. *Block v. O'Hara*, i. 145.

2. Whenever a request is necessary to be made, to give the party a right to sue, it must be specially stated in the declaration and proved on the trial; and the general allegation that he has been often requested, is not sufficient. *Ramsey v. Waltham*, i. 395.

3. But where the declaration is on a contract to pay a precedent debt or duty, no request need be stated or proved. *Ibid.*

4. Where the name of the maker of a note sued on is stated in the *queritur*, but omitted in setting out the note, the omission will be regarded as a mere clerical error, where the name can be supplied from the other parts of the declaration, and from oyer of the note. *Boyd v. Sargent*, i. 437.

5. In an action on a promissory note, it is not necessary to set out the consideration for which the note was given. *Rector v. Fornier*, i. 204.

6. So an instrument in writing, not under seal and expressing no consideration, may be sued on without alleging a consideration. *Sloan v. Gibson*, iv. 32.

7. An act to be done on the part of the plaintiff, as a part of his contract, must be alleged in his declaration, but a mere incident thereto need not. *Owens v. Geiger*, ii. 39.

8. An allegation that "the defendant hindered and prevented the plaintiff from completing his contract by throwing down a part of the work which the plaintiff was to do," is a sufficient statement of an excuse for its non-performance. *Little v. Mercer*, ix. 216.

9. In declaring on a written instrument, the plaintiff must set out its legal effect. It will not be sufficient to state that the defendant made his certain writing obligatory, &c., and then set out a copy of the instrument, without stating that the same was made to the plaintiff. *Moore v. Platte County*, viii. 467.

10. Although a declaration be defective in the *queritur*, if it contain a statement of the cause of action sufficient to apprise the defendant of the nature and extent of the grievance he is to defend, it is sufficient. *Little v. Mercer*, ix. 216.

b. SURPLUSAGE.

11. That which is surplusage in a declaration may be stricken out if there is then sufficient left for a good declaration. *Crocker v. Mann*, iii. 472.

c. JOINDER OF COUNTS.

12. The misjoinder of counts, by uniting in the same declaration a count in which the plaintiff sues in her private capacity, with one in which she sues as administratrix, is cured by verdict. *Yates v. Kimmel*, v. 87.

13. A party cannot join in the same declaration a count on a contract made by all the defendants, with a count on a contract made by only one of them. *Moore v. Platte County*, viii. 467.

d. PROFERT.

14. In suits in the County Court to establish a demand against an administrator, it is not necessary to make profert of the bond sued on. *Kearney v. Woodson*, iv. 114.

15. No objection to the plaintiff's statement will be good unless a general demurrer would lie, and want of profert is reached only by special demurrer. *Ibid.*

16. The failure of the plaintiff to make profert of the instrument sued on is a substantial defect in the declaration. *McCormick v. Kenyon*, xiii. 131.

e. VENUE.

17. Where a venue is laid in the margin or commencement of the declaration, that shall be the venue for all matters contained in the declaration which require a venue, and for which a special venue is not laid. *Benton v. Brown*, i. 393.

II. GENERAL RULES.

18. Pleadings lost or destroyed may be replaced, *nunc pro tunc*, by the authority of the court in which the action was brought and is pending. *Chambers v. Astor*, i. 327.

19. But pleadings so replaced must be between the same parties as at the commencement of the suit. *Ibid.*

20. Where a defendant, in his answer to a declaration, makes two pleas, which substantially put in issue the same thing, but one concluded to the court and the other to the country—*Held*, that the defendant must elect by which of the pleas he is willing to abide. *English v. Scott*, i. 408.

21. A replender will not be awarded where it appears, by the defendant's own showing, that in no way his plea can be put it will amount to a bar. *Easton v. Collier*, i. 421.

22. Matter more in the knowledge of one party than of the other must be pleaded by the party having that knowledge. *Owens v. Geiger*, ii. 39.

23. This character, §, where used in pleading in the place of the word "dollars," is bad. Therefore, where the plaintiff declared in two counts, with only one conclusion of damages, and that expressed thus, "§1,000," it was held, that the conclusion stood for the whole declaration; and, being thus defectively stated, both counts were bad. (R. S. 1825, 273, § 16.) *Goodall v. Harrison*, ii. 153.

24. The want of a *similiter* in pleading is no ground for reversing a judgment. *Garner v. Hays*, iii. 436.

25. A pleading must allege the facts, and not the belief of the party as to their existence. *Thomas v. Van Doren*, vi. 201.

26. The objection that the defendant failed to serve the plaintiff with a copy of his pleas, under an agreement, is waived by the plaintiff pleading over. *Cave v. Hall*, v. 59.

27. The party first in fault in pleading cannot take advantage of an omission to reply to his plea, which was unnecessary and defective. *Matthews v. Boas*, vi. 597.

28. Although it is not necessary to entitle a plea as of any court, yet, if a plea be entitled of a court different from that in which the suit is pending, it is bad. *Mattingby v. Cline*, vii. 499.

29. Alternative allegations in pleading are not admissible. Therefore an allegation charging that the defendant lost or destroyed, &c., is bad. *Stone v. Graves*, viii. 148.

30. The court may in its discretion, permit the plaintiff to withdraw his replication to the defendant's plea, even at the term following that at which the replication was filed. *Buford v. Byrd*, viii. 240.

31. The six days given by the statute for filing pleas, (R. S. 1835, 458, § 8,) are six days on which the court is in actual session;—and where a court adjourns over, the days on which it does not sit are not counted. *Wash v. Randolph*, ix. 141.

32. Where a party who has not been served with process appears voluntarily in the course of the term, he is entitled to six days from such appearance or to the end of the term in which to plead. (R. S. 1835, 457, §§ 1, 8,) *Whiting v. Budd*, v. 443.

III. PLEA IN ABATEMENT.

33. Misnomer of the plaintiff cannot be taken advantage of on the trial, or by plea in bar but must be pleaded in abatement. *JONES, J., dis. Hanly v. Blanton*, i. 49. *Boisse v. Langham*, i. 572. *Thompson v. Elliott*, v. 118.

34. A plea in an action by an infant, who sues by D., his next friend, that D. was not his next friend, is not good in bar. If it can be pleaded at all it must be in abatement. *Montgomery v. Tipton*, i. 446.

35. The word "Senior" is a mere addition, and no part of a name. *Neil v. Dillon*, iii. 59.

36. A plea to the merits waives all matters of mere abatement. *Fugate v. Glasscock*, vii. 577.

IV. PLEAS IN BAR.

a. GENERALLY.

37. Where there are several items in a plea in bar, there must be enough items in the whole, each one well pleaded, to meet the whole of the demand. *Mullanphy v. Phillipson*, i. 188.

38. A plea to an action on a judgment, alleging that the plaintiff, at the time of commencing the suit was seeking to enforce the collection of an execution issued on the same judgment, is a good bar to the action. *Yantis v. Burdett*, iii. 457.

39. A plea, alleging an assignment of a covenant to pay rent by the plaintiff to a third person, should aver the form of the assignment, whether verbal or in writing. *Thomas v. Cox*, vi. 506.

b. ACCORD AND SATISFACTION.

40. A plea which alleges that the defendant executed to the plaintiff a deed of certain property, which was to be absolute, in case the note sued on was not paid by a certain day, without alleging that the deed was accepted as a satisfaction, is bad. *Shaw v. Burton*, v. 478.

c. FAILURE OF CONSIDERATION.

41. Partial failure of consideration, under the statute, (R. S. 1845, 832, § 19,) could not be given in evidence in an action on a note, under the general issue, without notice. *Wallace v. Boston*, x. 660.

42. A plea which alleges that the note sued on was given for a patent, and that the patent was void in law, is bad, as tendering an issue of law for the finding of the jury. *Bennett v. Martin*, vi. 460.

See CONSIDERATION, IV.

d. FORMER RECOVERY.

43. When the same subject matter has been fairly put in issue, and once tried upon its merits, it cannot be again litigated. A judgment in a former suit between the same parties, for the same cause, and in the same form, of action, and necessarily supported by the same proof, is a bar to any other suit, so long as the judgment remains unreversed. *M'Knight v. Taylor*, i. 282.

44. In an action against an indorser of a promissory note, a former verdict and judgment in favor of the defendant in an action where the note was offered in evidence under a count on an account stated, is no bar. *Lindell v. Liggett*, i. 432.

45. A judgment against one of two several obligors is no bar to an action against the other. *Armstrong v. Prewitt*, v. 476.

46. The plaintiffs were entitled, under the will of their father, to certain slaves after the death of their mother, who owned a life estate in them, and who instituted a suit against the defendant to recover the slaves, and joined the names of the plaintiffs with her own therein. Judgment was rendered for the defendant. The plaintiffs after the death of their mother commenced this suit in detinue to recover the slaves—*Held*, that the judgment in the former action was no bar to this. *NAPTON, J., dis. Haile v. Hill*, xiii. 612.

See JUDGMENT, 28, 29.

e. FRAUD.

47. A plea, which alleges that the bond sued on was obtained fraudulently, that its consideration was the price of a slave sold by the plaintiff at auction, on which he, in order to induce bids by others, bid five hundred dollars, well knowing that the slave had a secret disease, and that the defendant had offered to return the slave, is good. *Casey v. Smales*, iv. 77.

48. In an action on a negotiable note by the payee against the maker, a plea which amounts to an averment of fraud on the part of both parties and a third person, with a view to defraud the creditors of the latter, is bad, as it tenders an issue foreign to the case. *Moore v. Thompson*, vi. 353.

f. PLEA PUIS DARREIN CONTINUANCE.

49. A plea *puis darrein continuance* is a relinquishment of all preceding pleas. After judgment, on demurrer to it, it cannot be withdrawn, to allow the defendant to plead a matter of defense arising prior to the time it was filed. *Tanner v. Roberts*, i. 416.

50. In an action of trespass for an assault where some of the defendants were acquitted on trial, and some found guilty, and the judgment is reversed, all may join in pleading a release, *puis darrein continuance*, at a subsequent term; and the objection that there has been a continuance since the existence of the subject matter of the plea cannot be taken advantage of on general demurrer. The allowance of such plea is in the discretion of the court, and the objection should be taken by motion to set aside the plea. *Nettles v. Sweazea*, ii. 100. *Thomas v. Van Doren*, vi. 201.

g. RELEASE.

51. A lost release cannot be pleaded. *Warder v. Evans*, ii. 205.

h. STATUTES AND RECORDS.

52. In pleading an act of the legislature, the title, being no part of an act, need not be recited. *Eckert v. Head*, i. 593.

53. But where a party, seeking to avail himself of the provisions of an act, refers to it merely by its title, he thereby makes the title material, and must recite it correctly, not to the very letter, but so that there be no material departure from the sense or sound. *Ibid.*

54. A plea of payment to an action of debt, founded on a judgment rendered

in the State of Kentucky, containing an averment that by the law of that State such a plea to such a declaration is good, puts in issue the law of Kentucky and should be replied to. *Hutchison v. Patrick*, iii. 65.

i. STATUTE OF FRAUDS.

55. A plea of the statute of frauds should expressly aver that the contract, concerning the lands sought to be enforced, was not in writing. *Bean v. Valle*, ii. 126.

j. VERIFICATION.

56. A plea of non-assumpsit, to a summons and petition on a promissory note, is good without an affidavit. *Burckhart v. Watkins*, iv. 72.

57. No affidavit of merits of an issuable plea is necessary, where there is evidence before the court fully establishing its truth. *Colgan v. Sharp*, iv. 263.

58. The act of February 27, 1843, (Acts 1842-3, 105, § 8,) requiring all special pleas, in actions on contract, to be verified by affidavit, applies to all such pleas filed after the passage of that act, although the suit was commenced before its passage. *Scott, J., dis. Barret v. Browning*, viii. 689.

59. A plea of the statute of limitations without affidavit, is bad, and may be stricken out on motion. (See Acts 1842-3, 105, § 8.) *Dorsey v. Hardesty*, ix. 157.

See AMENDMENT, 23.

V. VARIANCE.

a. BETWEEN THE WRIT AND DECLARATION AND JUDGMENT AND VERDICT.

60. Under the statute "concerning amendments and jeofails," (R. S. 1825, 128, § 9,) a variance between the writ and declaration, and the verdict and judgment, in the Christian name of the defendant, is fatal and avoids the judgment. *Sweazy v. Nettles*, ii. 6.

61. Where the summons varies from the declaration, the former may be amended. The variance cannot be taken advantage of on a motion to quash. *Jones v. Cox*, vii. 173. *Freeman v. Camden*, vii. 298. *Jarbee v. St. Bt. Daniel Hillman*, xix. 141. *Hite v. Hunton*, xx. 286.

62. In the plaintiff's declaration his name was written "Hudson," but in the writ "Hutson"—*Held*, that the variance was immaterial. *Cato v. Hutson*, vii. 142.

b. BETWEEN THE JUDGMENT AND EXECUTION.

63. It is no variance from the judgment to blend in an execution the damages and interest; nor, *per* TOMPKINS, J., is it a variance to blend in the execution damages, interest and costs. *M'Nair v. Lane*, ii. 57.

64. A variance of two cents between the judgment and the execution issued thereon, in stating the amount of debt recovered is immaterial. *Montgomery v. Farley*, v. 233.

C. BETWEEN EVIDENCE AND PLEADING.

aa. Generally.

65. Where time is material, a *videlicet* will make the allegation neither better nor worse, but the party will be bound to prove all material allegations as laid. Where therefore, in a declaration on a promissory note, it was averred that when the note became due and payable according to its tenor and effect, to wit: on the 5th of November, 1821, it was presented for payment, it was *held*, that the allegation, that when the note became due and payable, it was presented for payment, was a material averment, and no proof of a previous or subsequent presentation would satisfy it. *Schlatter v. Rector*, i. 286.

66. Where an instrument is not sued on, but used simply as evidence, a variance between it and the declaration is immaterial, if the substance of the allegation is proved. *Bell v. Scott*, iii. 212.

67. The defendant pleaded that, by a defeasance he was not bound to pay the bond sued on till after a settlement of accounts between him and the intestate. The defeasance offered in evidence was that, should a balance, on examination of books, be found due to the defendant, the bond should be credited therewith, &c. —*Held*, not to support the plea. *Weber v. Manning*, iv. 229.

68. An immaterial averment descriptive of a written instrument, which is set out in a declaration merely as inducement, need not be proved. *Ward v. St. Bt. Little Red*, vii. 582.

69. A variance between the real name of an indorser and that which is alleged in the declaration, and appears on the bill, is immaterial. *NAPTON, J., dis.* *Henshaw v. Liberty Insurance Co.*, ix. 333.

70. It is no variance in a declaration to set out part of the description of a tract of land which is omitted in the deed, the description as applied in the declaration not conflicting with the description in such deed. *Smith v. Willing*, x. 394.

71. An objection for variance between the declaration or bill of particulars and the evidence offered in support of it, must be taken at the first trial of a cause. *Carroll v. Paul*, xvi. 226.

72. The plaintiff in his declaration, averred that he had deposited a certain sum of money with B., as a banker, and that the defendant, in consideration that B. would take him as a partner, promised to pay the sum so deposited. The proof was, that the plaintiff had deposited the money with B. & C. as partners, that C. went out of the firm, and, shortly after, the defendant came in as a partner with B.; that the business of the firm remained unchanged by C.'s leaving it, and that the money deposited remained in the business as conducted by B. alone—*Held*, that this was no material variance. *Hoyt v. Reed*, xvi. 294.

73. In such a case, where the plaintiff produced his bank book which showed his account, commencing before the defendant came in as a partner, and running down after he came in, with balances struck after that time; and when it was shown that this account was but a transcript of the ledger of the concern, the court could not, with propriety, say that there was no evidence that the defendant had assented to the transfer of the liabilities of the old to the new firm. *Ibid.*

bb. *Judgments.*

74. Where a declaration avers a recovery of judgment for \$175 debt, and \$11 damages, and \$19 43½ costs, and the record offered in evidence does not show any specific amount of costs recovered, the variance is fatal. *Ferguson v. Frizel*, i. 441. *Lackland v. Pritchett*, xii. 484.

75. But it would be otherwise, if the record had shown that the costs had actually been taxed and certified by the clerk. *Warder v. Evans*, ii. 205.

76. Yet, if the taxation of costs by the clerk is not above the seal of the court, but beyond and below it, the variance will still be fatal. *Wash v. Foster*, iii. 205.

77. Where the declaration alleges that the decree was for \$125 51, "being the balance of hire for a negro boy, John;" and the decree was for \$125 51, "being the amount which the hire of the boy, John, exceeds the original advances made by defendant to plaintiff, and interest thereon;" it was *held*, that the record showed that the decree was for a balance of hire, and that there was no variance. *McQueen v. Farrow*, iv. 212.

78. The variance is immaterial where the judgment offered in evidence varies from that declared on, in mere omission of the name of the Judge before whom the judgment was rendered. *Hutchison v. Patrick*, iii. 65.

79. Where the record offered in evidence in an action of debt on judgment, shows that the judgment evidenced thereby has been satisfied, it is a variance from the declaration, and does not sustain it. *Blair v. Caldwell*, iii. 353.

80. In an action on a sheriff's official bond, for his neglect to make a proper return on an execution, the bond is the foundation of the action, and a variance in the date of the judgment given in evidence and the date alleged in the declaration is immaterial. *The State v. Martin*, viii. 102.

81. In action of debt on a judgment recovered in the "County Court" of Louisa County, in the State of Virginia, the plaintiff offered in evidence the record of a judgment rendered at a "Court of Quarterly Sessions" for said county—*Held*, that there was no variance, it appearing from the record that the "Court of Quarterly Sessions" was the "County Court." *Chandler v. Garr*, viii. 428.

82. The judgment recited in a *scire facias* was described as for \$248, damages and costs, and the record offered in evidence exhibited a judgment of \$248 for damages only, and a further judgment for costs—*Held*, that the variance on a plea of *nul tiel record*, was fatal. *Blakey v. Saunders*, ix. 733.

cc. *Deeds.*

83. A deed of four hundred arpens of land from the plaintiff's grantors is admissible in evidence in ejectment, where the plaintiff had filed a bill of particulars claiming only three hundred arpens. *Brown v. Cleaveland*, v. 65.

84. Where the covenant offered in evidence appears to have been executed in a county different from that alleged in the declaration, the variance is fatal. *Fields v. Hunter*, viii. 128.

85. Under the plea of *non est factum*, to an action of covenant, it is competent to show a variance between the deed offered in evidence and that declared on. *NAPTON J., dis. Treat v. Brush*, xi. 310.

86. If the declaration alleges an absolute covenant, and the deed offered in evidence shows the covenant to be dependent, it is a variance, and may be taken advantage of under the plea of *non est factum*. *NAPTON, J., dis. Ibid.*

87. Should the true intent and meaning of a deed be mis-stated in the declaration, the variance is cured, if the deed is set out in the plea on oyer, and *non est factum* is pleaded. *Wood v. Harris*, xii. 74.

dd. *Slander.*

88. Where the defendant, in his plea of justification, set out certain proceedings before a Justice, occurring December 1st, 1828, and the record, offered in evidence under the plea, showed the proceedings to have taken place on March 8th, 1828; it was *held* that the variance was immaterial, since the date was not alleged as descriptive of the record. *Martin v. Miller*, iii. 135.

89. Where the plaintiff, in an action of slander, alleged that the slanderous words were spoken in reference to his testimony in a suit in which S. was plaintiff and H. defendant, and offered in evidence, in support of the allegation, a record, in a suit in which S. and another were plaintiffs, and H. defendant—*Held*, that as the record was not the foundation of the action, the variance was immaterial. *Hibler v. Servoss*, vi. 24. *Dowd v. Winters*, xx. 361.

90. But where the allegation was that the plaintiffs were S. and S., and the record offered in evidence showed that S. and W. were plaintiffs—*Held*, that the proof was inconsistent with the averment, and that the variance was fatal. *Hibler v. Servoss*, vi. 24.

ee. *Misnomer.*

91. The middle initial is no part of the name, and its omission, or a mistake therein, is immaterial, and no ground of variance or misnomer. [*King v. Clark*, vii. 269, *OVERRULED.*] *Smith v. Ross*, vii. 463. *Orme v. Shephard*, vii. 606.

ff. *Petition and Summons.*

92. Where, in a suit by petition and summons, the petition followed the prescribed statutory form, and the summons required the defendant to answer to the plaintiff in a plea of debt, damages and costs, it was *held* that there was no material variance between the petition and summons. (See R. S. 1825, 620, §§ 1, 3.) *Fenton v. Williams*, iii. 228.

93. And it is not a material variance in setting out a copy of the note sued on, to write correctly words that are incorrectly spelled in the original. *Dent v. Miles*, iv. 419.

gg. *Recognizance.*

94. In an action on a recognizance of bail, plaintiff, in his declaration, set out a judgment recovered for \$1731 86, debt, and \$53 07 for damages, as well by reason of the detention of said debt, as for his costs and charges, &c. Defendant pleaded that no execution had been issued on that judgment against the principal. Plaintiff replied, and set out an execution for \$1731 86, debt, and \$41 12 for his damages, &c., together with his costs and charges, &c. To this replication

defendant demurred, on the ground of variance—*Held*, that the variance was not material. *Easton v. Collier*, i. 467.

See CHANCERY, 112 ; . . . DRAMSHOPS, 38 ; . . . INFRA, 163–176.

VI. DEMURRER.

95. The rule on demurrer is, that judgment must be given against the party who committed the first material error. *Collier v. Wheldon*, i. 1. *Wimer v. Shelton*, vii. 266. *Clark v. Murphy*, i. 114.

96. A demurrer brings up the sufficiency of all the pleadings which have preceded it. *Marshall v. Platte County*, xii. 88.

97. And is waived by pleading to the merits. *Barada v. Inhabitants of Carondelet*, viii. 644.

98. Where defendant pleads the general issue, and a special plea, to which there is a demurrer, the demurrer must be disposed of before the issue of fact is tried ; and a judgment rendered, generally, against the defendant, without passing upon the demurrer, or finding the issue of fact for the plaintiff, is erroneous. *Ellis v. Loumier*, i. 260.

99. Where there is a special demurrer to a declaration, and also a plea of payment, but no replication, the demurrer must be disposed of before judgment on the merits can be rendered ; and a judgment for plaintiff, in the absence of a replication to the plea of payment, is erroneous. *Manifee v. D'Lashmutt*, i. 258.

100. Where a declaration is demurred to, and no judgment is rendered therein, and the parties afterwards go to trial on a plea to the merits, it will be presumed that the demurrer is withdrawn. *Sweeney v. Willing*, vi. 174. *Dickey v. Malecki*, vi. 177.

101. But where a demurrer to a plea is overruled, and the plaintiff does not obtain leave to withdraw it and file a replication, it amounts to an election to stand on the demurrer, and the cause ought not to be tried, but judgment should be rendered for the defendant. *NAPTON, J., dis. Marshall v. Platte County*, xii. 88.

102. In a suit upon a penal bond, a general demurrer will not lie to a count assigning several breaches, if one be good. *Hayden v. Sample*, x. 215.

103. A general demurrer will not lie where there is one breach well assigned in a declaration containing but one count. *The State v. Campbell*, x. 724.

104. Nor will it be sustained where some of the counts are good and others bad, except as to the defective counts. *Marshall v. Bouldin*, viii. 244.

105. Nor is the want of an affidavit to a plea of *non est factum* any ground of demurrer. *Parker v. Simpson*, i. 539.

106. Nor is the fact that a bond signed by two has but one seal. If either party has not actually signed or sealed the instrument sued on, he should plead *non est factum*, under oath. *Smith v. Hart*, i. 273.

107. A demurrer assigning special causes, is to be regarded as a special demurrer, although it may contain a general assignment. *St. Bt. Reveille v. Case*, ix. 498.

108. An objection to a special plea, that it amounts to the general issue, can only be taken by a special demurrer. *Swearingen v. Knox*, x. 31.

109. Where amendments are made to a plea, and it is still insufficient, the plaintiff should demur. *Cox v. Capron*, x. 691.

110. Where a plea, in its commencement, professes to answer the whole action, but answers only a part of it, it is bad on general demurrer. *Weimer v. Shelton*, vii. 237.

111. Where the defendant neglects to demur to a defective declaration, he cannot avail himself of the objection at the trial, but will be put to his motion in arrest of judgment. *Bury v. City of St. Louis*, xii. 298. *Mullen v. Pryor*, xii. 307.

VII. OYER.

112. Oyer cannot be demanded after the first term, or after the time for pleading has expired. *McKnight v. Wilkins*, i. 308.

113. The mere entry, by the clerk, on the record, of these words: "Oyer of the writing obligatory," accompanied by a copy of the writing sued on, does not amount to oyer in law, so as to make the paper a part of the declaration. *Sumners v. Tice*, i. 349.

VIII. AIDER BY OYER, VERDICT AND JUDGMENT.

114. Where, in the second count of a declaration, the date of the instrument sued on is given by referring to a date in the preceding count, which contains two dates, the defect is cured by setting out the writing on oyer. *Boyd v. Sargent*, i. 437.

115. Where the issue joined is such as necessarily requires proof of facts defectively stated or omitted in the declaration, such defect or omission is cured by verdict. *Palmer v. Hunter*, viii. 512.

116. But where there are several counts in a declaration, and one is substantially defective, such defect is not cured by a judgment by default. The statute of jeofails does not reach such judgments. (R. S. 1845, 827, § 7.) *Neidenberger v. Campbell*, xi. 359.

117. A variance between the declaration and the instrument sued on is cured by verdict, since the proof is then presumed to correspond with the averments in the declaration. *Warne v. Anderson*, vii. 46.

NEW SYSTEM.

I. PETITION.

a. FORM AND SUFFICIENCY.

118. A petition in the form given in the statute, (Acts 1848-9, 106, No. 5,) is sufficient. *Gramp v. Dunnivant*, xxiii. 254.

119. The facts constituting the cause of action and the kind of relief sought, must be set forth in the petition with precision. *Bankston v. Farris*, xxvi. 175.

120. They must be so alleged as to entitle the plaintiff to judgment, under the principles and rules of law. *Biddle v. Boyce*, xiii. 532.

121. To avoid the estoppel of a judgment, it is sufficient, under the new code, to allege that it was obtained by fraud. *Edgell v. Sigerson*, xx. 494.

122. Under the practice act of 1849, (Acts 1848-9, 82, § 13,) the instrument sued on does not become part of the petition, nor is it necessary that it should be included in the copy of the petition which goes out with the summons. *Hadwen v. Home Mutual Ins. Co.*, xiii. 473.

b. ALLEGATIONS.

aa. Generally.

123. A petition on an account, for services rendered a third person, charging an original liability on the defendant, is sufficient. *Wing v. Campbell*, xv. 275.

124. The petition stated that the defendants made, their writing, by which they bound themselves to pay to the State of Missouri the sum of ten thousand dollars, upon a failure to perform certain conditions, but the conditions were not stated in the petition, and the bond was not upon the record—*Held*, that the petition was insufficient. *Woods v. Rainey*, xv. 484. *Woods v. Freeman*, xv. 488.

125. Where a person seeks to recover money wrongfully obtained by the defendant, under color of judicial proceedings, his petition must contain such averments as will exclude the idea that the money could have been lawfully obtained. *Funkhouser v. How*, xvii. 225.

126. An averment that a party "used and occupied premises, with the permission of the owner, thereby becoming his tenant," is a sufficient averment of indebtedness. *Walker v. Mauro*, xviii. 564.

127. A petition stating the character in which the plaintiff sued, (as administratrix,) and the indebtedness to the intestate, and praying judgment as administratrix for the debt, is a sufficient statement of the cause of action, and of her right to sue. *Duncan v. Duncan*, xix. 368.

128. Defendant received from plaintiff a demand for collection, and gave therefor a receipt, stating that he would either collect the demand or return the evidence of it. A petition upon this receipt was held good, though not expressly averring that the plaintiff was entitled to the money when collected, nor that the defendant promised to pay it to him. *Ramsours v. Campbell*, xix. 358.

129. In a petition on a promissory note it is not necessary to allege the consideration upon which it was given. *Caples v. Brunkham*, xx. 244.

bb. Of Damages.

130. Judgment was reversed, because the court below instructed the jury, in an action for work and labor on a *quantum meruit*, that the plaintiff having fixed

a price per week for his services in his account filed, that he had alleged and must prove a contract for that sum. *Waldstein v. Bredell*, xvii. 352.

131. The petition alleging no special contract, the party suing can recover only what his services were reasonably worth. *Crole v. Thomas*, xix. 70.

C. VERIFICATION.

132. A petition signed by the plaintiff had the affidavit required by the statute, but was without the *jurat*. The plaintiff filed an affidavit showing that the petition was sworn to before it was filed—*Held*, that the petition might be verified, *nunc pro tunc*. *Bergesch v. Keevil*, xix. 127.

133. Under the new code, (Art. VII, § 4,) if an account sued on, containing more than twenty items annexed to and, by express terms, averred to be a part of the petition, is not to be considered a part thereof; still the plaintiff should be permitted to verify it by affidavit at the trial. *Budde v. Allen*, xxi. 20.

134. In a suit by a husband and wife, under the new code, (Acts 1848–9, 81, § 2,) the affidavit of the husband is a sufficient verification of the petition. It is too late to object to the verification of a pleading when a case is called for trial. *Huntington v. House*, xxii. 365.

D. FILING INSTRUMENTS WITH PLEADING.

135. Section 13, Art VII, of the practice act of 1849, which requires either party relying upon a record, deed, or other writing, to file the original, or a copy with his plea, (Acts 1848–9, 82,) is only applicable to cases in which the party recites his title in his pleading, as existing by written conveyance; or to a case in which the record or writing is recited in the pleading as confirming or barring a right. *Sexton v. Monks*, xvi. 156. [See R. S. 1855, 1241, § 60.]

136. A party is not required to file with his pleading all his documentary evidence, nor to set forth every link in his chain of title. *Gitt v. Watson*, xviii. 274.

E. JOINDER OF CAUSES OF ACTION.

137. Although the plaintiff may unite in his petition as many causes of action as he may have, yet they must be distinctly and separately stated, so as to be intelligible to one of common understanding. *Childs v. Bank of Missouri*, xvii. 213. *Mooney v. Kennett*, xix. 551.

138. Where several causes of action are blended, in violation of the rules of pleading, the proper way of correcting the irregularity would seem to be by motion to compel the plaintiff to elect for which cause of action he will proceed. *Ibid*.

139. Under the statute, (R. S. 1855, 1228, §2,) a cause of action against A. and B. cannot be joined in the same petition with a cause of action against B. alone. (This was a suit to foreclose a mortgage executed by B. to secure A. and B.'s note to the plaintiffs, and for judgment against both on said note.) *Doan v. Holly*, xxv. 357. *Same case*, xxvi. 186.

See CHANCERY, 117–128.

II. GENERAL RULES.

140. Under the new code, it is not necessary that facts should be stated in a pleading according to their legal effect. *Page v. Freeman*, xix. 421.

141. Nor is it necessary to state the facts or circumstances by which the ultimate fact relied on is to be proved. *See v. Cox*, xvi. 166. *Sanders v. Anderson*, xxi. 402.

142. A party who seeks relief, under the new code, on a merely equitable title, against a legal title, must, in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks, under the old form of practice. *Maguire v. Vice*, xx. 429.

143. In an action for services from January 17th to June 15th, 1853, the answer alleged, that "on or about the 17th January" the plaintiff agreed to serve the defendants for one year, &c. The court below struck out the answer, on the ground that the agreement alleged therein was within the statute of frauds, § 5—*Held*, that it was error to strike out the answer, that section of the new code which enacts a liberal construction of pleadings with a view to substantial justice being applicable. (Art. VII, § 5.) *Bersch v. Dittrick*, xix. 129.

III. MOTIONS TO STRIKE OUT.

144. A motion was made to strike out the defendant's answer. When the case was called, the defendant did not appear, and judgment was given for the plaintiff, without formally disposing of the motion—*Held*, that the defendant could not complain of this disposition of the case. *Webb v. Stevens*, xiv. 480.

145. A motion to strike out imperfect counts from a declaration must be made before the jury is sworn, or the trial submitted to the court, and upon reasonable notice to the adverse party. *The State v. Price*, xv. 375.

146. Where an answer improperly blends, and defectively states, matters set forth therein as a defense and as a counter claim, the proper mode of taking advantage of the defect is, not by demurrer to the whole answer, but by motion to strike out either the whole of it, or such portions as are defectively pleaded. *Kinney v. Miller*, xxv. 576.

IV. ANSWER.

a. LEAVE TO ANSWER AND TIME OF FILING.

147. Under the practice act of 1849, the defendant has six days to answer, but he may file his answer at any time within that period, and if he files it in less than six days, the plaintiff must reply in two days from the filing, unless the court, for good cause, extend the time. (Acts 1848-9, 80, §§ 2, 9.) *Beach v. Curle*, xv. 105.

148. Where the defendant fails to answer within the time limited, it is not an

unsound exercise of discretion to refuse leave to file an answer which does not show a meritorious defense. *Hallowell v. Page*, xxiv. 590. *Page v. Page*, xxiv. 595.

b. SUFFICIENCY.

149. A general averment in an answer, that the defendant does not owe the money sued for, or any part thereof, is not sufficient. The facts on which the defense rests must be alleged. *Sapington v. Jeffries*, xv. 628.

150. But where the plaintiff alleged that the defendant owed him a certain sum, an answer denying the indebtedness is sufficient. *Westlake v. Moore*, xix. 556.

151. In a suit on a note, an answer stating that the defendant made two payments, "the last of which extinguished the note," is sufficient. *Joy v. Cooley*, xix. 645.

152. Where the petition gives defendant notice of violations of the contract upon which the alleged indebtedness arose, the defendant should answer such breaches specifically, and not merely state that he is not indebted. *Engler v. Bate*, xix. 543.

153. In a suit brought by a firm upon a note, under the new code, an answer, which denies any knowledge sufficient to form a belief as to whether the plaintiffs compose the firm to whose order the note was payable, is erroneously stricken out. *Wales v. Chamblin*, xix. 500.

154. The petition charged the defendant with wrongfully taking personal property belonging to the plaintiff. The answer alleged that the defendant took the property, as constable under an execution against a third party, in whose possession it was, but did not rebut the allegation that it was the property of the plaintiff—*Held*, that the answer was properly stricken out. *Barley v. Cannon*, xvii. 595.

c. EQUITABLE DEFENSE.

155. Law and equity being now blended, an equitable title arising out of a contract for the sale of land, is a defense to an action instituted to recover possession of the land, the subject of the contract. *Tibeau v. Tibeau*, xix. 78.

d. SETTLEMENT PUIS DARREIN CONTINUANCE.

156. A receipt in full given by the plaintiff, after suit brought, is a good defense, by way of plea *puis darrein continuance*. *Wade v. Emerson*, xvii. 267. *Wade v. Goldsberry*, xvii. 270.

e. COUNTER CLAIM.

157. Matter set up in an answer as a counter claim should be separately stated. *Kinney v. Miller*, xxv. 576.

f. WAIVER OF OBJECTION TO PETITION.

158. The objection that the petition does not state facts sufficient to constitute

a cause of action, is not waived by a failure to demur or to suggest the objection in the answer. *Andrews v. Lynch*, xxvii. 167.

g. VERIFICATION.

159. If an answer is signed by the defendant at the bottom, and the magistrate appends his statement that the defendant personally appeared before him, and made oath that the facts stated in the answer were true, it is a substantial compliance with the practice act, (Acts 1848-9, 81, § 2.) It is not necessary that the defendant should sign the certificate of the magistrate, as an affidavit separate from the answer. *Smith v. Benton*, xv. 371.

See ERROR, 43.

V. DEMURRER.

160. Where a statute creates an absolute bar by mere lapse of time, without exception, the defense may be made by demurrer, if the necessary facts appear in the petition. *The State v. Bird*, xxii. 470.

161. But a demurrer should be resorted to to raise the defense of the statute of limitations, if at all, only where it clearly appears that the plaintiff's case has been fully stated, and that, being so stated, no recovery can be had. *McNair v. Lott*, xxv. 182.

162. Where there is a misjoinder of causes of action, any defendant may demur to the petition; but where there is a joinder of improper parties as defendants, the defendant or defendants improperly joined can alone demur. *Ashby v. Winston*, xxvi. 210.

VI. VARIANCE.

a. GENERALLY.

163. The omission of the words "without defalcation or discount," in declaring on a note, does not constitute a variance, where the declaration does not assume to set out the note in its words. *Powers v. Browder*, xiii. 154.

164. Where a petition describes a writing as a promissory note, and it turns out in proof that it is also negotiable, there is no variance. *Beach v. Curle*, xv. 105.

165. Where the defendant, in his answer, admits that he executed the note annexed to the plaintiff's petition, in manner and form as charged in the petition, he cannot make the objection of variance when the plaintiff unnecessarily offers the note in evidence. *Cummings v. Guttridge*, xvii. 469.

166. The plaintiff sued the defendant for negligence in the construction of a sewer, and alleged that, at the time of the accident, "the sewer gave way." The proof was that the sewer had given way previous to the accident—*Held*, that, under the new code, this variance was immaterial, and not such as to occasion a non-suit. *Reeves v. Larkin*, xix. 192.

167. A variance, which is a mere matter of form, and has nothing to do with the substance of the action, in a cause originating before a Justice, is not fatal; hence the plaintiff was allowed to recover on a *quantum meruit*, when the account filed stated a contract. *Metz v. Eddy*, xxi. 13.

168. In an action on a judgment obtained in another State, the plaintiff alleged that they, J. J. R. and C. R., recovered the said judgment: the transcript of the record showed that J. J. R. and C. C. R. had recovered the judgment—*Held*, that the omission of the initial letter in the name of the last named plaintiff was not a material variance. *Randolph v. Keiler*, xxi. 557.

169. In an action on a foreign judgment, the petition described the court in which said judgment was recovered, as the “inferior court of,” &c. The word “inferior” was omitted in some parts of the exemplification of the record and inserted in others—*Held*, that the inconsistency was not of such importance as to prejudice the plaintiff. *Ibid*.

170. Where the allegation was that the plaintiffs were administrators *de bonis non* of the deceased, and general letters were produced, appearing on their face to be general letters of administration, and it was proved that there had been a previous administration, it was *held* that there was not a fatal variance. *The State v. Price*, xxi. 434.

171. The petition alleged that the plaintiff and defendant “jointly leased” certain premises of one A., and that the defendant collected the rents, and failed to account to plaintiff for his share. Upon the trial, plaintiff offered in evidence a lease from a third person to A., and an assignment from him to plaintiff and defendant—*Held*, that this was a variance, and that the court might properly refuse to receive the assignment in evidence, unless the plaintiff amended his petition. *Deickman v. McCormick*, xxiv. 596.

b. FAILURE OF PROOF.

172. The statute, (Acts 1848–9, 87, § 3,) provides that, “where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof.” The same provision is re-enacted in the R. S. 1855, 1285, § 1.

173. Under this statute it was *held* that, under a petition for goods sold and delivered, a recovery could not be had upon a state of facts which constituted a trespass *de bonis asportatis*. *Link v. Vaughn*, xvii. 585.

174. And where the plaintiff alleged that he bought for the defendant, at the defendant’s request, a certain stall in a market, and the proof was that the plaintiff bought the stall for himself and afterwards sold the same to defendant—*Held*, that this was an entire failure of proof within the meaning of the statute. *Beck v. Ferrara*, xix. 30.

175. Where the petition stated a case of trover, and the proof was that the goods were lost by the negligence of the defendant—*Held*, that the plaintiff could not recover without amending his petition. *Duncan v. Fisher*, xviii. 403.

176. A party cannot state one cause of action, and if that proves unfounded

ask that another cause of action may be tried. *Robinson v. Rice*, xx, 229. *Pensenneau v. Pensenneau*, xxii, 27.

See ADMINISTRATION, 26-29;....AMENDMENT, III;....BAILMENT, 14;....BILLS EXCHANGE AND PROM. NOTES, 89, 90;....BOATS AND VESSELS, VIII;....BOND, VII;....BONDS, NOTES AND ACCOUNTS, 66-69;....CHANCERY, III;....CONSIDERATION, IV;....COVENANT, 21-29;....DEBT, II;....EJECTMENT, 24, 25;....FRAUD, III;....FRAUDULENT CONVEYANCES, IX;....FREEDOM, 11, 12;....LIBEL AND SLANDER, III;....LIMITATIONS, IX;....MALICIOUS PROSECUTION, II;....MECHANICS' LIEN, 24-25;....PARTITION, 11-13;....PETITION IN DEBT, II;....REPLEVIN, IV;....SCIRE FACIAS, 14;....SET-OFF, IV;....TRESPASS, V;....TROVER, VII;....USURY, IV.

P O O R.

1. A party who voluntarily buries a poor person, has no legal demand against the county, under the statute, (R. S. 1845, 799, § 6.) *Scott, J., dis. Duval v. Laclede County*, xxi, 396.

P R A C T I C E.

I. APPEARANCE.

- a. GENERALLY.
- b. IN ATTACHMENT SUITS.

II. DISMISSAL OF SUITS.

III. INTERLOCUTORY JUDGMENT.

- a. BY DEFAULT.
- b. BY NIL DIT.
- c. SETTING ASIDE JUDGMENT BY DEFAULT.
- d. ASSESSMENT AND INQUIRY OF DAMAGES.

IV. NON-SUIT.

- a. GENERALLY.
- b. WHEN IT MAY BE TAKEN.
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V. CONTINUANCE.

- a. GENERALLY.
- b. WHEN IT SHOULD BE GRANTED.
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VI. BILL OF DISCOVERY.

VII. TRIAL.

- a. GENERALLY.
- b. QUESTIONS FOR THE JURY.
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VIII. TRIAL OF QUESTION OF FACT BY THE COURT.

- a. IN WHAT CASES.
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IX. TRIAL BY REFEREES.

X. INSTRUCTIONS.

- a. GENERALLY.
- b. FORM AND WORDING.
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- i. CORRECTING ERRORS IN.
- j. CONSTRUCTION OF.
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- l. AS TO THE WEIGHT OF EVIDENCE.
- m. ITS LEGAL EFFECT.

XI. VERDICT AND DAMAGES.

XII. IRREGULARITY, WHEN TO BE TAKEN ADVANTAGE OF.

XIII. INCIDENTAL PROCEEDINGS.

- a. BILL OF PARTICULARS.
- b. NOTICE TO PRODUCE PAPERS.
- c. NOTICE OF MOTION.
- d. SECURITY FOR COSTS.

XIV. BILL OF EXCEPTIONS.

- a. GENERALLY.
- b. MAKING UP.
- c. SIGNING.
- d. EXCEPTIONS, WHEN TO BE TAKEN.
- e. EVIDENCE.
 - aa. Generally.
 - bb. Objections to.
 - cc. Grounds of Objection.
 - dd. Depositions.

- f. INSTRUCTIONS.
- g. MOTIONS.
- h. FINDING OF FACTS.
- i. INQUIRY OF DAMAGES.
- j. AFFIDAVITS.
- k. PAPER NOT FILED OR FILED WITHOUT LEAVE.

I. APPEARANCE.

a. GENERALLY.

1. Where the defendant appears and pleads to the merits of an action, the regularity and sufficiency of antecedent notice will be presumed; but it is otherwise where the appearance is simply for the purpose of a motion to dismiss. *Bonney v. Baldwin*, iii, 49. *Bartlett v. McDaniel*, iii, 55.

2. The appearance of a party to any regular steps in the progress of a cause is a waiver of notice that such cause was about to be prosecuted. *Rector v. St. Louis Circuit Court*, i, 607.

3. And of all defects in the summons. *Barnett v. Lynch*, iii, 369.

4. Where the plaintiff and defendant reside in different counties, and the suit is brought in the county in which the plaintiff resides, and the summons is served upon the defendant in the county in which he resides, and he appears and pleads to the action, the illegality of the service is waived thereby. *TOMPKINS, J., dis. Hembree v. Campbell*, viii, 572.

5. A defendant who appears and files an answer is thereby precluded from taking advantage of a defect in the return of service of process. *Phillebart v. Evans*, xxv, 323.

6. Under a statute requiring, in actions brought by infants, that the next friend shall file an acknowledgment, in writing, of his appearance for the infant, (1 Ter, L. 843, § 5,) and such appearance is entered on the record without such acknowledgment being filed, the want of formality is waived by pleading to the merits, and the case should not be dismissed on motion because of the informality. *Montgomery v. Tipton*, i, 446.

7. But a party who is in court for one purpose is not necessarily there for any other. *Anderson v. Brown*, ix, 638.

8. Nor does the fact that the defendant, when the cause was called for trial, appeared and objected to the court proceeding with it, on the ground that he had not been served with process, as required by law, render a judgment by default regular. *Smith v. Rollins*, xxv, 408.

b. IN ATTACHMENT SUITS.

9. An appearance and motion to dissolve an attachment is a waiver of antecedent personal service, and authorizes a general judgment and execution. *Whiting v. Budd*, v, 443. *Lutes v. Perkins*, vi, 57, explained, and the decision in *Whiting v. Budd* confirmed,—*Evans v. King*, vii, 411.

10. So an appearance and plea to the merits waives all error in overruling a

motion to dissolve the attachment on the ground of insufficiency in the affidavit. *Schlatter v. Hunt*, i. 651.

See PROCESS, 4, 11, 22.

II. DISMISSAL OF SUITS.

11. Where a party has failed to comply with a rule to give security for costs, he will not be allowed to do so after a motion to dismiss. *Snell v. Owens*, iii. 225.

12. Since a Justice is allowed the whole of the first day of a term to make return of a writ of *certiorari*, a motion to dismiss on that day is premature. *Hill v. Young*, iii. 337.

13. Where a suit is commenced and carried on without the authority of the person in whose name it is conducted, the suit should be dismissed, although there has been an appearance by the defendant and two continuances. *Keith v. Wilson*, vi. 435.

14. In the absence of any rule of court on the subject, an entry by the clerk in a book kept for that purpose, or on a paper filed in the cause, is sufficient evidence of the dismissal of a suit, under the act of January 14, 1839, (Acts 1838-9, 98.) *Shoults v. Baker*, vii. 350.

15. Where an appeal is taken from the judgment of a Justice, the plaintiff may dismiss his suit in the appellate court. The cause then stands as if no judgment had been rendered. *Turner v. Northcut*, ix. 249.

16. A suit by attachment was commenced before a Justice against B. F. Otis and — Otis, upon a note signed by B. F. Otis & Co. Judgment by default was rendered against the defendants; an appeal was then taken to the Circuit Court, and the plaintiff moved for leave to dismiss as to — Otis, B. F. Otis being the only person of that name in the firm. A refusal of this motion was held to be erroneous. *Moore v. Otis*, xviii. 118.

17. Where an action is commenced against two defendants, by summons against one and attachment against the other, and judgment by default is entered against both, and afterwards, on motion of one, the default as to him is set aside, he cannot afterwards have the action dismissed on the ground of this very separation of parties. Under the new code the action should proceed against him as sole defendant. *Franciscus v. Bridges*, xviii. 208.

18. Under the new code it is improper to dismiss a suit because all are not made parties who should have been, the court having power to order others interested to be made parties. *Hayden v. Marmaduke*, xix. 403.

III. INTERLOCUTORY JUDGMENT.

a. BY DEFAULT.

19. After a judgment by default is taken, it is irregular to allow the defendant to plead until the judgment is set aside. There should first be a motion to set aside the default, and thereupon leave to plead. *Hickman v. Barnes*, i. 156.

20. Where a plaintiff amends his declaration, and at the same time takes judgment by default, it is erroneous; but the judgment will not be reversed unless a motion be made in the court below to set aside the judgment by default, and the refusal of the court be excepted to and made a part of the record. *Ibid.*

21. Under the act "simplifying proceedings at law for the collection of debts," (R. S. 1825, 620,) the defendant is allowed six days to plead; and if judgment be taken against him by default before the time for pleading expires, it is error, and is not cured by opening the judgment on motion of the plaintiff, without notice to the defendant. *Currin v. Ross*, ii. 203.

22. Judgment by default is properly taken in a case where, to a plea of former recovery in another court, the replication is *nul tiel record*, with an averment and prayer of debt and damages, and no rejoinder is filed. *Burckhart v. Watkins*, iv. 72. *Bates v. Hinton*, iv. 78.

23. A judgment by default in a suit where the writ was made returnable on no specified day, is irregular and void, for want of notice. *Bobb v. Graham*, iv. 222.

24. The defendant at the first term filed a plea of set-off, to which the plaintiff demurred. The demurrer was overruled at the next term, when the plaintiff withdrew it and filed a replication—*Held*, that the defendant was entitled to a continuance; but, having failed to rejoin, the court did right in giving judgment against him by default. *Dempsey v. Harrison*, iv. 267.

25. After issue is joined, the court cannot give a judgment by default. The judgment must be on the finding of the issues. *Elliott v. Leak*, iv. 540.

26. Under the practice act of 1849, in a suit on a promissory note, where the defendant has been regularly served by leaving a copy at his usual place of abode fifteen days before the return day of the writ, and he fails or neglects to answer, the court may render judgment against him by default. *Holland v. Hutton*, xv. 475.

27. It is erroneous to take judgment by default where a judgment of non-suit appears upon the record. *Kelly v. Hogan*, xvi. 215.

28. Where a defendant is out of time with his answer, though it be filed on the same day on which a judgment by default is taken against him, a motion to set aside the judgment will be overruled; especially if, in his affidavit filed with his motion, he shows no reason or excuse for his failure to plead in time. *Edwards v. Watkins*, xvii. 273.

29. After a judgment for costs is rendered against the plaintiff, a final judgment by default cannot be taken against the defendant without his appearance, and without setting aside the former judgment. *McAdams v. McHenry*, xxii. 413. *McElhany v. McHenry*, xxvi. 174.

30. In an action against the sureties in a constable's bond, the judgment was reversed for the refusal of the court below, in the exercise of its discretion, to permit the defendants, after a motion to dismiss overruled, and before judgment by default, to file their answer, setting up lapse of time as a bar. *The State v. Bird*, xxii. 470.

31. Where a judgment by default was rendered on a set-off for want of a reply, without it appearing that there was any meritorious defense, the court therein exceeded a sound discretion. *Arnold v. Palmer*, xxiii. 411.

32. An interlocutory judgment rendered at a return term, in an action not founded on a bond, bill or note, for the direct payment of money or property, cannot be proceeded upon to final judgment at such return term; but where such interlocutory judgment is rendered at a term succeeding the return term, it may be proceeded on to final judgment at the term at which it is rendered. The statute, (R. S. 1855, 1280, § 11,) relates only to the disposition of causes at the return term. *RICHARDSON, J., dis. Doan v. Holly*, xxvi. 186. [See R. S. 1855, 1595, § 25.]

b. BY NIL DICIT.

33. In an action on a writing obligatory, signed by a partnership and declared on as sealed with the seal of the partners named, it will be considered, after judgment by *nil dicit*, not only that both partners assented to the act of sealing, but that they both performed the act of sealing, either jointly or severally. *McKnight v. Wilkins*, i. 308.

34. Where a plea suited to the action has been pleaded in proper time and replied to, the plaintiff is not entitled to judgment by *nil dicit*. *Cox v. Capron*, x. 691.

35. Under the new code, (Acts 1848-9, 80, §§ 7, 8,) where a defendant upon whom there has been fifteen days' service of process files an answer admitting the cause of action, and containing no defense, the plaintiff is entitled to judgment at the return term as for want of an answer. *Scott, J., dis. North v. Nelson*, xxi. 360.

36. Where an answer is lost, and an entry made on the record that by agreement of parties the defendant may file an answer within a certain time, judgment may be rendered as for want of an answer, if none is so filed. *Owens v. Tinsley*, xxi. 423.

37. Where a judgment by *nil dicit* is rendered, if the demand sued on is unliquidated, a writ of inquiry is necessary. *Robinson v. Lawson*, xxvi. 69.

c. SETTING ASIDE JUDGMENT BY DEFAULT.

38. In an affidavit to set aside a default, the defendant must state that he has, or believes he has, a meritorious defense, and set out the evidence by which he expects to support it. *Barry v. Johnson*, iii. 372.

39. An affidavit which states that the defendant was advised, &c., without stating that he was advised by counsel, is insufficient. It must also show due diligence. *Lecompte v. Wash*, iv. 557.

40. In order to the setting aside of a judgment by default, it must not only appear that the party has a meritorious defense, but also that he has exercised due diligence in his efforts to make that defense. *Green v. Goodloe*, vii. 25.

41. A judgment will not be set aside, after the damages are assessed, on account of the mistake or negligence of the defendant's attorney. No distinction is made between the negligence of the party and the negligence of his attorney. *Field v. Matson*, viii. 686. *Kerby v. Chadwell*, x. 392. *Austin v. Nelson*, xi. 192. *Ridgley v. St. Bt. Reindeer*, xxvii. 442.

42. It is not sufficient ground to set aside a judgment by default that the affi-

davit accompanying such motion states a good defense, and that "defendant is a German by birth, and could not understand the English language unless explained to him, and that he did not understand, when the sheriff served the writ upon him, that he had to appear in court," it appearing that "he refused to hear the writ read to him," and that he knew he was sued. *Heisterhagen v. Garland*, x. 66.

43. In an action against the town of Carondelet, the process was served on the chairman of the board of trustees, whose term of office expired before the suit was called, and a judgment was obtained by default. During the term his successor appeared and moved to set aside the default, basing the motion on an affidavit which stated "that the late chairman had neglected to attend to the suit, and that the affiant, his successor, had attended to the suit as soon as he heard of it," &c.—*Held*, that the court properly refused to set aside the default, since the affidavit itself disclosed a want of due diligence. *Town of Carondelet v. Allen*, xiii. 556.

44. Where it appears that a party has a meritorious defense, and that a judgment by default has been rendered against him in consequence of the absence of his attorney, who had been in attendance in court until the trial of another cause had commenced, and then only left to attend to his sick family, and, while so absent for a short time, the suit which had been on trial was suddenly terminated by a compromise, and thus the judgment by default was had, it will be set aside. *Stout v. Lewis*, xi. 438.

45. The counsel for the defendants engaged the services of another attorney to attend to his cases, and gave him a memorandum of them, in which the present suit was entered, "*Webster v. Harris & Williams*." Upon examining the docket, the substitute attorney found no such case. It was docketed "*Webster v. McMahan, &c.*" When the cause was called, no counsel appeared, and judgment by default was rendered. The judgment of the court below, overruling a motion to set aside the default, was affirmed. *Webster v. McMahan*, xiii. 582.

d. ASSESSMENT AND INQUIRY OF DAMAGES.

46. The court may assess the damages where neither party requires the intervention of a jury. *Alexander v. Hayden*, ii. 211.

47. And where they have, in the first instance, fixed the damages for non-performance, the court will not interfere with their intentions. *Irwin v. Tanner*, i. 210.

48. In an action of covenant for rent, on a deed between the parties, where judgment by default is entered, the court may calculate the sum due, without a jury, and without a writ of inquiry being taken. *Dent v. Morrison*, i. 130.

49. On a judgment by default, the court cannot assess the damages unless the suit is founded on an instrument in writing by which the demand is ascertained. (R. S. 1835, 461, §§ 34, 35.) *Pratte v. Corl*, ix. 162.

50. Where a note is made payable, "with the current rate of exchange on Philadelphia, when due," the amount due thereon does not appear upon its face and the court, under the statute, (R. S. 1835, 461, §§ 34, 35,) cannot assess the

damages after default. *Guelberth v. Watson*, viii. 663. [*Aliter*, R. S. 1855, 1280, § 10.]

51. On an inquiry where the measure of the damages is that which has actually been sustained, the plaintiff must offer proof of the injury, or he will only recover nominal damages. But where the compensation is fixed by the contract, and the contract and breach are admitted by the pleadings *prima facie*, the plaintiff is entitled to the amount of compensation agreed upon without proof, although the defendant might, by proof, reduce such amount. *Webb v. Coonce*, xi. 9.

52. Where an action is brought for an injury to a boat, and damages are proved, but not the amount, judgment should be for the plaintiff, with nominal damages. *Brown v. Emerson*, xviii. 103.

53. In a suit for damages, under the new code, where the demand is not liquidated, or the law does not fix the measure of damages, a writ of inquiry must be executed, and the damages proved, before final judgment upon a default, and the record must show that there was an inquiry. *Wetzell v. Waters*, xviii. 396.

54. After judgment by default, the defendant cannot, on an inquiry, give evidence in denial of the plaintiff's right of action. The default admits that. *Froust v. Bruton*, xv. 619.

55. A writ of inquiry of damages awarded after demurrer overruled, may be executed at the same term at which it is ordered. *Summers v. Tice*, i. 349.

56. And may be executed at a subsequent term on a judgment by default. *Froust v. Bruton*, xv. 619.

57. Where a judgment by default is entered, and the damages are unliquidated, if a writ of inquiry be awarded at the same term, notice should be given to the defendant of the day on which the inquiry will be made. (See R. S. 1835, 460, §§ 31, 35.) *Evans v. Bowlin*, ix. 402.

58. But the want of such notice is no cause for reversing the judgment below, where it results from the fault of the defendant. (R. S. 1845, 815, § 42.) *Faber v. Bruner*, xiii. 541.

59. In cases arising under the new code, (Acts 1848-9, 88, § 2,) the assessment of damages might have been made under the writ of inquiry, at the same term at which the interlocutory judgment was rendered. *Robinson v. Lawson*, xxvi. 69.

60. Evidence of a special contract, fixing the amount of compensation for services, or of a special contract making payment contingent, is not admissible upon an inquiry of damages, after a default upon a *quantum meruit* or *indebitatus* count. *Munford v. Wilson*, xix. 669.

See *INFRA*, 331, 332.

IV. NON-SUIT.

a. GENERALLY.

61. Where a judgment of non-suit was entered, with a proviso that, on good cause shown, the judgment will be set aside, a motion to set it aside ought to be made and decided at the same term. *Chambers v. Astor*, i. 327.

62. The entry of a non-suit as to one of several defendants in an action on a contract, does not discharge the others. (See R. S. 1835, 459, § 18. Acts 1838-9, 99, § 1.) *Brown v. Pearson*, viii. 159.

63. A judgment of non-suit cannot be entered against the plaintiff without his consent. *Floating Dock Insurance Co. v. Soulard*, viii. 665. *Wells v. Gaty*, viii. 681. *Clark v. St. Bt. Mound City*, ix. 145, 147. *Perrin v. Wilson*, ix. 147. *Welles v. Biddle*, ix. 158.

64. Where the plaintiff suffered the term at which the plea was filed to pass without filing a replication, and after a lapse of twenty-five days in the succeeding term, judgment of non-suit was entered against him, the court properly refused to set aside such judgment, no good cause for the failure of the plaintiff to file his replication, being shown. (See R. S. 1835, 458, §§ 9, 32.) *Baskerville v. Childs*, viii. 703.

65. Unless exceptions are taken to a judgment of non-suit, it will be presumed to be taken voluntarily. *Harrison v. Bank of Illinois*, ix. 160.

66. Where the plaintiff takes a non-suit, and institutes a new suit by filing the same original declaration, although improper practice, it is not sufficient cause for reversing the judgment. *Jeffries v. McLean*, xii. 538.

67. The fact that the attorney submitted to a non-suit, under a misapprehension of the purport and meaning of an instruction, is not cause for setting it aside. *Pearce v. Dansforth*, xiii. 360.

68. The plaintiff, after submitting his evidence, took a non-suit, and before the jury dispersed, but after the non-suit had been entered upon the minutes, moved the court to cancel the order and allow the cause to proceed, which the court refused—*Held*, that the court erred in refusing to cancel the order, and its judgment was for that cause, reversed. *Collier v. Swinney*, xiii. 477.

69. Where a demurrer to a petition is improperly sustained in part, and overruled in part, and the plaintiff takes a non suit, he is entitled to have the non-suit set aside. *Leimer v. Pacific Railroad*, xxvi. 26.

b. WHEN IT MAY BE TAKEN.

70. A cause was submitted to the jury in the evening, and the court, by consent, gave certain instructions; the next morning, the jury informed the court that they could not agree, whereupon the court withdrew the instructions, and gave new ones—*Held*, that the plaintiff had a right to take a non-suit after the new instructions were given, and before the jury retired: *Hensley v. Peck*, xiii. 587.

71. The plaintiff may take a non-suit at any time previous to the retiring of the jury to consider their verdict. *Templeton v. Wolf*, xix. 101.

72. Where a cause is tried by the court, and the parties request a declaration of the law of the case, the plaintiff should have an opportunity, after the law is declared, to take a non-suit. *Lawrence v. Shreve*, xxvi. 492.

c. WHEN NOT.

73. After a cause shall have been finally submitted to the jury, or the court, sitting as a jury for its decision, the plaintiff shall not be permitted to take a

non-suit. But the rule is different in what would formerly have been suits in equity, according to the old rules of distinction *Hesse v. Missouri State Mutual Fire and Marine Ins. Co.*, xxi. 93.

V. CONTINUANCE.

2. GENERALLY.

74. It is error to refuse a continuance when a good cause is shown. *Moore v. McCulloch*, vi. 444. *Tunstall v. Hamilton*, viii. 500.

75. As where due diligence is used in procuring testimony, and the party fails to obtain it. *McLane v. Harris*, i. 700.

76. And is available as well where a non-suit is taken, as where a trial is had. *Darne v. Broadwater*, ix. 18. *McKay v. The State*, xii. 492.

77. But a plain and palpable case must be made out in order to authorize this interference with the discretion of the court. *Freleigh v. The State*, viii. 606.

78. In order to entitle a party to a continuance on account of the absence of a material witness, it must be shown that he applied as soon as he could, under the law, for the aid of the court in obtaining his testimony, and that the witness lived at such a distance, or was absent under such circumstances as to forbid the reasonable belief that he could be brought in on an attachment forthwith. *English v. Mullanphy*, i. 780.

79. The court exercises a sound discretion in refusing a continuance when the testimony disclosed in the affidavit would not avail the applicant on trial. *Riggs v. Fenton*, iii. 28.

80. Where a motion for a continuance on the ground of the absence of a material witness is overruled, the Supreme Court will not hold it to be error, if it clearly appears that the testimony of the absent witness would not have affected the result. *The State v. Worrell*, xxv. 205.

81. S. was served with summons, April 21st, to appear at a session of the court to be held on the 19th June following. He appeared, and moved for a continuance, on the ground of the absence of material witnesses in Alabama, which motion was overruled—*Held*, to be a sound exercise of discretion. *M'Girk, J., dis.* *Scogin v. Hudspeth*, iii. 123.

82. It is no objection to proceeding to trial, that an order obtained by the defendant for the production of a paper, which had been answered by one of the plaintiffs, had not been answered by the other. *Perry v. Roberts*, xvii. 36.

83. It is competent for the court to permit a party to file his replication *nunc pro tunc*, and if a continuance is not asked by the adverse party, he cannot afterwards make it a ground of objection that none was granted. (See R. S. 1835, 467, § 1.) *Kiser v. Wilkes*, v. 519.

84. The word "after" was repeated, by mistake, in copying the note sued on, and an amendment allowed; whereupon the defendant moved for a continuance, which being refused, he moved for a new trial, and that was denied—*Held*, that there was no error in the judgment and rulings of the court. *Chambers v. Lane*, v. 289.

85. A court is not warranted in vacating a continuance, and ordering a trial, without strong reasons. When it is done on motion of one party, the other party should be served with an authentic copy of the order. *Marsh v. Morse*, xviii. 477.

86. The admission of counter affidavits on a motion for a continuance, is within the discretionary power of the court. *Riggs v. Fenton*, iii. 28. [By the rules of the Common Pleas, Land and Circuit Courts of St. Louis County, such affidavits are excluded.]

87. All cases originating in the St. Louis Court of Common Pleas, where there has been twenty days personal service, are triable at the first term, notwithstanding the new code. *Finney v. Brant*, xix. 42.

b. WHEN IT SHOULD BE GRANTED.

88. Where a demurrer is withdrawn at the trial term, and a replication filed in its stead—*Held*, that it is improper to force the defendant to trial at such term. *Risher v. Thomas*, i. 739. So, too, where the plaintiff amends his declaration in a matter of substance. *Tunstall v. Hamilton*, viii. 500.

89. A declaration containing two counts, one upon a note, and the other the common count for money had and received, is not triable at the return term. But if the parties go into a trial, and take no exceptions thereto, the judgment will not be reversed. *Watson v. Walsh*, x. 454.

90. Where a replication is filed at a subsequent term of the court, although without any objection, the defendant is entitled to a continuance. *Bunding v. Blumenthous*, viii. 695.

91. Where a witness, who resided eighteen miles from the place of trial, was subpoenaed on the 11th, and the cause was set for trial on the 13th, but not tried until the 15th, it was *held*, that this was due diligence and good ground for a continuance. *Darne v. Broadwater*, ix. 18.

92. Where, in petition in debt, service is made by leaving a copy with the defendant's wife fifteen days before the return day of the summons, but no personal service is effected, and the defendant appears and pleads, he is entitled to a continuance, under the statute, (R. S. 1835, 449, §§ 4, 5,) as a matter of course. *Donaldson v. Anderson*, v. 480. *Kinsey v. Watson*, vi. 209.

93. Where suit was commenced in the St. Louis Court of Common Pleas, prior to the act of January 16, 1843, providing that "after the issues shall have been made up, the suit shall stand continued to the second term," (Acts 1842-3, 57, § 3,) and after the passage of that act, the plaintiff amended his declaration by filing additional counts—*Held*, that the defendant was entitled to a continuance, although the 9th sec. of the act of January 21, 1841, establishing the Court of Commons Pleas, (Acts 1840-1, 51,) made such cases triable at the first term, where personal notice had been served on the defendant. *Tunstall v. Hamilton*, viii. 500.

C. WHEN NOT.

94. The issuing of an attachment against a witness, returnable at the next term, is not good ground for a continuance. *English v. Mullanphy*, i. 780.

95. It is not a sufficient ground for a continuance, that the witness summoned to prove a particular fact was not in attendance, unless it appears, from the affidavit, that the fact could not be proved by any other person whose attendance could have been procured. *Freleigh v. The State*, viii. 606.

96. The sickness of a witness residing in another State, is no ground for a continuance, no efforts having been made to take his deposition. *Hamiltons v. Moody*, xxi. 79.

97. A suit on a promissory note, by an assignee against the maker, is triable at the return term, although the assignment is denied. *Armstrong v. Johnson*, xxvii. 420.

98. Under the statute, (R. S. 1855, 1595, § 25,) in a suit against a steamboat for transporting a slave, inquiry of damages may be made at the return term in case of judgment by default. *Ridgeley v. St. Bt. Reindeer*, xxvii. 442.

D. AFFIDAVIT.

99. Where a case is called for trial, the court is not bound to wait for a party to prepare an affidavit for a continuance, it appearing that he had previously had an opportunity to prepare it. *Myers v. Schneider*, xxi. 77.

100. Where an affidavit for a continuance is filed, the court should not permit it to be strengthened by other affidavits of the same person. *The State v. Buckner*, xxv. 167. See SUPRA, 86.

VI. BILL OF DISCOVERY.

101. After a bill of discovery in a suit at law is answered with a specific denial of the claim, it requires two witnesses, or one witness, with strong corroborating circumstances, to disprove the answer. But where the claim is not specifically denied, it may be established in the same manner as though an answer had not been put in. *Buckner v. Armour*, i. 534.

102. After a cause has been called, and the jury sworn to try it, the court will not grant leave to the defendant to file a bill of discovery in that stage of the proceedings. In case of surprise, or the discovery of new evidence, the remedy is by motion for a new trial, when a bill for discovery may be proper. *Price v. Cannon*, iii. 453.

103. A petition for discovery, under § 10, R. S. 1835, p. 462, presented at the term next following the trial term is in time; and it is no objection to the discovery sought, that the party seeking it had procured a continuance on account of the absence of a witness, by whom he expected to prove the facts sought to be discovered, when the petition shows that the deposition of the witness had been taken and failed to prove those facts. *Dempsey v. Harrison*, iv. 267.

104. Sec. 10 of Art. IV of the act relating to practice at law, (R. S. 1835, 462,) giving to "either party to a suit in a court of record," a "discovery from the other party," was intended to apply to suits originating in courts of record, and not for those brought by appeal from a Justice. *Atwood v. Reyburn*, v. 555.

105. The plaintiff's answer to the defendant's bill of discovery, under the statute, (R. S. 1835, 462, § 10,) which is not used by the defendant, is not admissible in evidence for the plaintiff against the defendant's consent. *Fugate v. Carter*, vi. 267. (But see R. S. 1855, 1291, § 33.)

106. And where, in such a case, the answers are read in evidence by the party calling them out, he is not at liberty to contradict them by other evidence. *Ibid.* (But see R. S. 1855, 1291, § 33.)

107. A bill of discovery may be read to a jury, when offered as merely introductory to the answer. *Walsh v. Agnew*, xii. 520.

108. Upon the day of trial, and after the cause has been once continued, it is too late to present a petition for a discovery. *Glasgow v. Switzer*, xii. 395.

109. Such parts of a bill of discovery as are not answered, or not sufficiently answered, cannot be taken as confessed and considered as evidence. The statutory proceeding to obtain a discovery is a substitute for the bill in chancery, for the same purpose, and the court will compel full and sufficient answers before the trial of the cause will be permitted to proceed. If the party seeking the discovery considers the answer insufficient he must except to it, and have the decision of the court. But after he has proceeded with the trial, and read the answer in evidence, he cannot object to its sufficiency, or ask any further action of the court upon his petition. *Roussin v. Perpetual Insurance Co.*, xv. 244.

110. Bills of discovery are abolished by the statute, (R. S. 1855, 1290, §§ 28-31.) *Bond v. Worley*, xxvi. 253.

VII. TRIAL.

a. GENERALLY.

111. The court may permit the jury to take with them such papers, which are in evidence, as may be useful in making up their verdict. *Cornelius v. Grant*, viii. 59. *Hanger v. Imboden*, xii. 85.

112. Where the execution of the instrument sued on is admitted by the pleadings, the court may exclude it from the jury. *Curl v. Mann*, iv. 272.

113. It is erroneous, in an action against three joint trespassers, for the court, on the plaintiff's request, after the jury are sworn, and before any evidence is offered, to direct the jury to find a verdict of not guilty as to one of the defendants, and thereupon permit his examination as a witness against the other two. *EDWARDS, J., dis.* *Gearhart v. Smallwood*, v. 452.

114. It is not necessary to find the issue of payment where there was no evidence given in its support, as the defendant suffers no injury by the omission. *Armstrong v. Prewitt*, v. 476.

115. The proper remedy in a case where one of two breaches assigned in a declaration is defective, is to move on the trial to exclude all evidence relating to the defective breach. *The State v. Porter*, ix. 352.

116. When a trial has commenced, and witnesses have been examined, it is a matter of discretion with the court to refuse or permit a party to give a new bond for costs, with a view to cancel the old bond, and to use a security therein as a witness. *Matthews v. Coalter*, ix. 696.

117. The omission of the plaintiff to pay the jury fee, (see R. S. 1845, 1100, § 6,) before judgment entered, is a matter of no consequence to the defendant. *Heisterhagen v. Garland*, x. 66.

118. Where a witness is improperly excluded at the instance of a party, he cannot cure the error by admitting a part of the witness' statement. *St. Bt. Madison v. Wells*, xiv. 360.

b. QUESTIONS FOR THE JURY.

119. Where there is any evidence which has a tendency to establish a particular fact or issue the jury are the sole judges of its weight and sufficiency, and it is error to instruct them that there is no evidence to establish such fact or issue. *Whitney v. The State*, viii. 165. *Winston v. Wales*, xiii. 569. *Magoon v. Whitney*, i. 613. Where the objection to evidence goes to its sufficiency, and not to its competency or relevancy, it is matter for the determination of the jury. Thus, where a paper, offered as collateral proof, purports to be executed by a firm, it is not necessary, in order to its introduction, first to show that the makers of it were partners. *Patterson v. McClanahan*, xiii. 507.

120. Although, under the practice act of 1849, all material allegations in the petition are taken to be true which are not specifically denied, or any knowledge thereof sufficient to form a belief disavowed, (Acts 1848-9, 82, § 12,) yet it is the duty of the court to determine what questions of fact are to be tried, and what facts stand admitted by the pleadings, and it is error to leave this to the jury. *Butcher v. Death*, xv. 271. *Steil v. Ackli*, xv. 289.

121. Although, as a general rule, the interpretation of written instruments belongs to the court, the construction and true interpretation of commercial correspondence, may, under proper circumstances, be left to the jury. *Fagin v. Connolly*, xxv. 94.

122. In a case for the jury, it is not proper to direct any particular fact to be put in issue. The issues are made by the pleadings, and they should be submitted to the jury as thus made. *Bankston v. Farris*, xxvi. 175. *Overton v. Webster*, xxvi. 332.

123. It is the province of the court to construe written instruments, but where they are adduced as containing evidence of facts, the jury are authorized to draw such inferences from them as they may deem warranted. *Primm v. Haren*, xxvii. 205.

124. Where possession is proved, it is for the jury to determine whether acts of the defendant, of which evidence is given, amount to a trespass; and it is error for the court to instruct the jury that upon the whole evidence in the cause the plaintiff cannot recover. *Perry v. Block*, i. 484.

125. P. agreed to deliver to F. the note of John McMiickle, in part payment for a horse, and tendered as such a note signed John Mickle—*Held*, that it was for the jury to say from all the circumstances, whether the note tendered was

the note understood and intended by the parties in their contract. *Fenton v. Perkins*, iii. 23. *Same Case*, iii. 144.

126. Under the provision of the statute, allowing creditors six per cent. interest where money has been "withheld by an unreasonable and vexatious delay of payment;" (R. S. 1825, 461, § 1,) it is for the jury to say whether there has been such delay, and it is error for the court to instruct them "to allow interest at the rate of six per cent. from the time they believe the defendant received the money." *McLean v. Thorp*, iv. 256.

127. The delivery of goods is a question of fact to be found by the jury, under the direction of the court. *Houghtaling v. Ball*, xix. 84.

128. So of fraud in the procurement of an entry of land, in a contest between two claimants from the United States. *Waller v. Von Phul*, xiv. 84.

129. So, also, is the question, whether the actual defect in property sold was greater than that excepted in the vendor's warranty. *Wade v. Scott*, vii. 509.

130. Whether there was a special agreement, by which the original demand sued on was extinguished by a note or receipt in full, is a question of fact for the jury, and not for the court. In such cases, parol evidence is admissible in explanation. *St. Bt. Charlotte v. Hammond*, ix. 58.

131. In an action on a promissory note, to which defendant pleaded *non assumpsit* within five years, and evidence was given of general admissions by the defendant, of indebtedness, it is the province of the jury to decide, from all the circumstances in the case, whether the admission made related to the note sued on, or not; and the court should not instruct the jury that there was no evidence of an admission of the indebtedness on the note. *Chamberlin v. Smith*, i. 482.

132. In a suit on a note not negotiable under the statute, against the indorser, the question of the insolvency of the maker is a mixed question of law and fact and is to be submitted to the jury, under the instructions of the court. *Pococke v. Blount*, vi. 338.

133. Whether an indorsement on a note has been erased is a fact for the jury to find, and the opinion of experts in relation thereto is not admissible. *Swan v. O'Fallon*, vii. 231.

134. Any competent evidence of the execution of a bond, however slight, will authorize the reading of it in evidence. Whether the evidence is sufficient to prove its execution, is a question of fact for the finding of the jury. *Hicks v. Chouteau*, xii. 341.

135. What constitutes adverse possession is a question of law,—the facts to establish that possession are to be found by the jury. *Macklot v. Dubreuil*, ix. 473.

136. The plaintiff claimed under one M. and proved possession in him prior to Dec. 20, 1803, and gave in evidence deeds from the heirs of M. to himself. The defendant derived title from the widow of M., to whom the premises had been confirmed by the recorder under the act of Congress of June 13, 1812, (2 U. S. Stat. 748,)—*Held*, that it must be left to the jury to find whether the land described in the deeds given in evidence was the same land described in the plaintiff's declaration;—and whether it was a village or other lot, contemplated by the act of Congress. *Lawless v. Newman*, v. 236.

137. And the plaintiff having failed to satisfy the jury that the land in dispute was such lot, and showing no French or Spanish Grant, it was held that he could not recover. *Newman v. Lawless*, vi. 279.

138. Where the calls of a survey are all ascertained and no resort to external evidence is necessary, it is a question for the court. But where parol evidence is resorted to, to identify the calls, the facts must be found by the jury. *Ott v. Soulard*, ix. 573.

139. The petition for a concession called for "*le chemin public*," (the public road,) the certificate of survey accompanying the plat of the land conceded, called for "*el real camino*," (the royal road.) There being two roads near each other, and the right of the parties depending upon the determination of the road intended in the grant, it is a question of both law and of fact, and the facts are to be determined by a jury. *Ibid.*

140. What are appurtenances of a steamboat, is a question of fact to be determined by the jury. *Amis v. St. Bt. Louisa*, ix. 621.

141. Although an agent at the time he makes a verbal contract discloses his agency, and gives the name of his principal, it does not necessarily follow that he is not personally liable. Whether the credit was given to the agent or his principle is a question of fact to be determined by the jury. *Hovey v. Pitcher*, xiii. 191. *Pitcher v. Hovey*, xvi. 436.

142. Whether the agent acted within the scope of his authority is a question of fact to be determined by the jury. *Taylor v. Labeaume*, xiv. 572.

143. What were the intentions of the donor of a slave by parol whether to make a conditional or absolute gift is a question of fact for the jury, and not of law for the court. *Halbert v. Halbert*, xxi. 277.

144. If goods be delivered to commission merchants to be sold in a particular manner, their inability so to sell does not excuse a deviation attended by a loss. But that deviation having been the act of agents to whom the goods were sent, the jury shall determine whether they were the agents of the commission merchants or of the owner of the goods. *Pomeroy v. Sigerson*, xxii. 177.

.See AGENCY 41.

C. POLLING THE JURY.

145. Upon the rendition of a verdict by a jury, either party has a right to cause the jury to be polled; and a refusal by the court of leave for that purpose, is error. *Hubble v. Patterson*, i. 392.

146. Where, on the polling of a jury, eleven assent to the verdict, and one juror, in answer to the question "is this your verdict," answers "it is, as far as it goes,"—*Held*, that this answer did not invalidate the verdict. *Rankin v. Harper*, xxiii. 579.

D. PUTTING IN AND ORDER OF TESTIMONY.

aa. Generally.

147. The order in which testimony shall be received is a matter within the discretion of the court and it is not error to refuse to permit the plaintiff to read,

as evidence in chief, portions of a deposition taken by himself, and to reserve the remainder as rebutting testimony. *Young v. Smith*, xxv. 341.

148. But where the rules governing the putting in of testimony are relaxed and one party is liberally indulged, thereby throwing the other party off his guard, it is error for the court to enforce these rules rigidly against the other party, to the exclusion of material testimony. *Rucker v. Eddings*, vii. 115.

149. The court in the trial of a cause, may, in its discretion and in promotion of the ends of justice, allow either party to introduce testimony out of the regular order. *Rucker v. Eddings*, vii. 115. *The State v. Porter*, xxvi. 201.

150. So after a witness has been examined and cross examined, the court may allow either party to examine him again, even as to new matter. Material testimony ought not to be rejected, because offered out of order. *Brown v. Burrus*, viii. 26.

151. But where testimony has once been given the court is not bound to permit its repetition. *Crow v. Marshall*, xv. 499.

152. Although evidence offered may not of itself be sufficient to establish a defense, it should be admitted, if it establish a link in the chain of evidence. Its weight must be left to the jury, and cannot be decided by the court. *Lane v. Kingsberry*, xi. 402. *Platte County v. Marshall*, x. 345.

153. The competency of evidence cannot always be determined until it is all in, and then if found incompetent it may be excluded by instructions. *Fitzgerald v. The State*, xiv. 413. *Sparr v. Wellman*, xi. 230. *Knox v. Hunt*, xviii. 174.

154. And this must be done in express terms. It is not enough to do so by inference and implication. *Pavey v. Burch*, iii. 447.

155. Where an excuse is pleaded for the non-performance of a covenant it is proper for the plaintiff to give evidence negating the plea. *Curl v. Mann*, iv. 272.

156. The court may in its discretion admit evidence after the cause has been closed. *Pearce v. Dansforth*, xiii. 360.

157. And even after the argument has commenced, a witness may be recalled to supply an unintentional omission in the evidence. *Hood v. Mathis*, xxi. 308.

158. So after the plaintiff, in an action against the indorsers of a promissory note, has closed his testimony and an instruction has been moved on it, it is not error to permit him to recall a witness to show the character of the notice given to the indorsees. *Johnston v. Mason*, xxvii. 511.

159. The plaintiff, in a suit for wages, proved the services rendered, and closed his case, but omitted to prove their value. Immediately afterwards he offered to prove their value by witnesses in court;—*Held*, that the court should have permitted him to do so. *Owen v. O'Reilly*, xx. 603.

160. After a motion for judgment of non-suit, because letters of administration have not been read, the plaintiff having stated that his case was closed, the court may permit the letters to be given in evidence. *Huston v. Becknell*, iv. 39.

161. Where, after the close of the plaintiff's evidence, the defendant asked and the court gave an instruction, which defendant announced was sufficient to dispense with proof on his part, and the court, after argument of plaintiff's counsel, gave different instructions, it is an unsound exercise of discretion for the

court to refuse the defendant leave to introduce his testimony, and a new trial will be granted for that cause. *Moreland v. McDermott*, x. 605.

162. Where a fact may be shown in different ways, the party may select his own mode of proof. *The State v. Fulkerson*, x. 681.

163. Where a document is admissible in evidence for any purpose, it should not be excluded, it devolves on the opposite party to call on the court to explain to the jury how far and for what purpose it is evidence. *Allen v. Moss*, xxvii. 354.

164. If relevant testimony with respect to an alleged written contract, is introduced by either party, the other party is entitled to have the contract read in evidence. *Newman v. Mays*, xxvii. 520.

bb. *Objections to.*

165. It is not sufficient to object generally that testimony offered is illegal and incompetent, some specific objection to its admission must be pointed out. *Clark v. Conway*, xxiii. 438. *Grimm v. Gamache*, xxv. 41.

cc. *Agreements in respect of.*

166. A written stipulation that the testimony of a witness on a former trial may be read in the trial of a cause, is a general stipulation that the same testimony may be read in any future trial of the same cause, nor is such stipulation of a nature to require its being filed in the cause. *Carroll v. Paul*, xix. 102.

e. ARGUMENT.

167. Where the *onus probandi* lies upon the defendant, it is his right to open the case to the jury; but this is a matter within the discretion of the court. *Wade v. Scott*, vii. 509. *Tibeau v. Tibeau*, xxii. 77.

168. The court has discretionary power to limit the time to be occupied by counsel in addressing the jury and the Supreme Court will not interfere unless this discretion has been abused. *Scott, J., dis.*, holding that the time could not be limited in advance. *The State v. Page*, xxi. 257.

VIII. TRIAL OF QUESTION OF FACT BY THE COURT.

a. IN WHAT CASES.

169. It is not erroneous to submit a cause to a jury, no objection being made at the time, after it has been submitted to the court without a jury. *McAllister v. Mullanphy*, iii. 38.

170. In proceedings against a constable for delinquency in not returning an execution, the trial must be by the court, and it is error to submit the cause to a jury. *Hart v. Robinett*, v. 11. *Hart v. Spence*, v. 17.

171. The statute, which authorizes the court to try issues of fact where neither party requires a jury, (R. S. 1835, 463, § 15,) applies only to cases in which both parties appear in court. *Sutton v. Clark*, ix. 555. *Swearingen v. Knox*, x. 31. *Benton v. Lindell*, x. 557.

b. FINDING OF FACTS.

aa. Generally.

172. Where a cause is submitted without a jury, judgment must show that all the issues have been passed upon. *Russell v. Barcroft*, i. 514.

173. Under the practice act of 1849, the distinct questions of law or fact, upon which a review is sought must be stated in the application, and a case made in which the material evidence shall be set forth, since, otherwise, the judgment will be affirmed if the facts found warrant the conclusions of law. *Skinner v. Ellington*, xv. 488.

174. Where a cause is tried by the court, the facts must be found and set forth. *Marmaduke v. McMasters*, xxiv. 51.

175. And cover all the issues made by the pleadings, otherwise it is insufficient. *Downing v. Bourlier*, xxi. 149.

176. And warrant the conclusions of law and the judgment rendered thereon. The Supreme Court will not, from the facts found, infer the existence of other facts. *Pearce v. Burns*, xxii. 577. *Pearce v. Roberts*, xxii. 582. *The State v. Ruggles*, xxiii. 339.

177. But the court need not set out in its finding, the facts admitted in the pleadings. *Carlisle v. Mulhern*, xix. 56.

178. The facts, and not the evidence, should be set out. *Javens v. Harris*, xx. 262. *Murdoch v. Finney*, xxi. 138. *Sutter v. Streit*, xxi. 157.

179. And the facts found must be those in issue. *Allison v. Darton*, xxiv. 343.

180. Where there is a dispute as to the legal effect of the facts found, the court should find the facts upon which either party claims that the issue is maintainable. *Farrar v. Lyon*, xix. 122.

181. The finding should state explicitly whether the defendant was affected with notice of the fraud of those through whom he claimed title, if notice of such fraud is material. *Chouteau v. Nuckolls*, xx. 442.

182. A judgment for plaintiff will not be reversed for an insufficient finding of facts, if the matters set up in the answer do not constitute a valid defense. *Henderson v. Henderson*, xxi. 379.

183. The finding of facts is a part of the record, and need not be preserved in a bill of exceptions. *Sutter v. Streit*, xxi. 157.

184. Under the revised code of 1855, no finding of facts is necessary when a cause is tried by the court. The old practice in such cases is now revived. *Kurlbaum v. Roepke*, xxvii. 161.

185. A finding of facts by the court in a suit instituted since the revised code of 1855 went into effect, being unauthorized, forms no part of the record of the cause, and will not be referred to in the Supreme Court for any purpose. *Martin v. Martin*, xxvii. 227. *Brosius v. McGaugh*, xxvii. 230.

186. A finding by the court that possession has been held adversely, is equivalent to a finding that the possession has been held under a claim of title. *Chouquette v. Barada*, xxiii. 331.

bb. *On Appeal from County or Probate Court.*

187. Under the code of 1849, a finding of facts is necessary in causes appealed from a County or Probate Court. *Walsh v. Edmonson*, xix. 142. *Whyte v. Bennett*, xx. 262. *Foster v. Rucker*, xxvi. 494.

cc. *On Appeal from Justices.*

188. No finding of facts is necessary in the trial of appeals from Justice's courts. *Haase v. Stevens*, xviii. 476. *Sickles v. Patterson*, xviii. 479. *Clemens v. Broomfield*, xix. 118. *Boyle v. Skinner*, xix. 82. *Clohecy v. Ragan*, xx. 453. *Terrell v. Hunter*, xxi. 436. *Glasby v. Prewitt*, xxvi. 121.

dd. *On Inquiring of Damages.*

189. Nor upon an inquiry of damages after a judgment by default. *Hubbell v. Weston*, xviii. 604. *Gates v. Clavadetscher*, xix. 125. *Loudon v. King*, xxii. 336.

See *INFRA*, 330; . . . *SUPRA*, 37.

C. FACTS AGREED.

190. The parties to a suit may agree to the facts of the case, and submit them to the court to declare the law arising on such facts. But they will not be allowed to agree on a fictitious statement of facts not in the cause, and thus obtain the opinion of the court on matters wholly disconnected with the suit. *Blair v. State Bank of Illinois*, viii. 313.

191. An agreed case stands in lieu of a special verdict, and the court pronounces the conclusion of law, as if the same facts had been found by special verdict. The parties may agree to certain facts involved in a case, while they dispute other matters of fact on either side. In such case, the agreement is used before the tribunal which tries the question of fact, as evidence concluding the parties, so far as they have agreed, but in that case, the judgment will be upon the finding of the facts, and not upon the agreed case. *Munford v. Wilson*, xv. 540.

192. Where under the new code, (Acts 1848-9, 95, Art. XX,) a statement of facts is agreed upon by the parties, no finding of facts is necessary. *White v. Walker*, xxii. 433.

D. EVIDENCE.

193. On an issue to the court, upon a plea of payment, it is no objection to a finding for the plaintiff that the bond sued on was not read, since it was in the possession of the court and its execution was not denied. *Armstrong v. Prewitt*, v. 476.

194. Where a cause is tried by the court without a jury, and evidence is offered to prove a fact in issue, and after having been seen and examined by the court, is ruled out as inadmissible, this will be regarded as equivalent to declaring the evidence thus excluded insufficient to establish the fact sought to be proved thereby. *Ubsdell v. Cunningham*, xxvi. 385.

e. INSTRUCTIONS.

195. Where the cause is submitted to the court without a jury, the safer course is to first declare the law, and then find the issue of fact, so that an exception in matter of law may be clearly understood. *Piercfield v. Snyder*, xiv. 588.

196. Upon the trial of a question of fact by the court, under § 2 Art. XV, of the practice act of 1849, it is inappropriate and useless to ask instructions. It is the duty of the court to find the facts and pronounce the law upon them. If the facts found do not warrant the conclusion of law, the judgment is erroneous. *Gobin v. Hudgens*, xv. 400. *Clouse v. Maguire*, xvii. 158.

197. Where a cause is tried by the court sitting as a jury, it is not erroneous to refuse instructions asked by either party to the suit. *Wilbur v. Clark*, xxii. 503.

f. JUDGMENT.

198. Where a cause is submitted to the court, a judgment rendered, generally, without finding the issues between the parties, is erroneous. *Ferguson v. Seawell*, i. 256.

199. Where issues of fact are submitted to the court, they must be found for one party or the other, and a judgment without such finding is erroneous. *Lee v. Collins*, i. 587.

IX. TRIAL BY REFEREES.

200. A report of a referee, to whom a cause had been referred, under the new code, (Acts 1848-9, 91, Art. XVI,) upon the whole issue, must be received in the same manner as if the cause had been tried by the court, and the court had made a finding of the facts. *Maguire v. McCaffrey*, xxiv. 552.

201. Where it is apparent from the face of the report of a referee that his decision is erroneous, the judgment of the court confirming the report will be erroneous, and the party aggrieved is entitled to a reversal thereof, although no motion for a review be filed within the time required. *Shore v. Coons*, xxiv. 556.

202. Where the trial of an issue of fact under the new code, (Acts 1848-9, 91, § 2,) does not require the examination of a long account, it is improper to refer it against the remonstrance of one of the parties. *Martin v. Hall*, xxvi. 386.

X. INSTRUCTIONS.

a. GENERALLY.

203. It is error to instruct the jury to find as they may think right upon the evidence. *Bailey v. Ormsby*, iii. 580.

204. So it is erroneous, under the act of 1831, (2 Ter. L., 284,) to instruct the jury to find as they "may think right and equitable" in cases appealed from a Justice. *Cleveland v. Davis*, iii. 331.

205. An instruction to find, as in case of a non-suit, is unauthorized. *Marshall v. Wolfe*, xi. 608.

206. And when grounded on a partial statement of facts, is properly refused. *Himes v. McKinney*, iii. 382.

207. It is not the business of the court to draft instructions, although requested. Its action may be limited to the giving or refusing of such as are specifically requested. *Simonds v. Oliver*, xxiii. 32.

208. The refusal to give an instruction is not equivalent to the assertion of the converse proposition of law. *Miles v. Davis*, xix. 408.

209. But the refusal of a correct instruction, unaccompanied with any exposition of law embraced therein, is error. *Christy v. Price*, vii. 430.

210. Instructions must be so given as substantially to embrace the whole point of the case presented, although this need not be in the words asked. *Coleman v. Roberts*, i. 97. *Williams v. Harrison*, iii. 411. *Nicholas v. The State*, vi. 6.

211. And where the instructions as a whole contain a correct exposition of the law and fairly present the case, the judgment will not be reversed because exceptionable when taken separately, or because others were refused which were proper in themselves, or because of the refusal of an instruction which is the converse of one given. *Williams v. Vanmeter*, viii. 339. *Hurst v. Robinson*, xiii. 82. *Huntsman v. Rutherford*, xiii. 465. *Gamache v. Piquignot*, xvii. 310. *Young v. White*, xviii. 93.

212. Nor for refusing an instruction which is afterwards substantially given. *Carroll v. Paul*, xix. 102.

213. Nor where a single instruction, taken by itself, is defective as not applying to all the facts before the jury. *Neale v. McKinstrey*, vii. 128.

214. Nor because the court instructed the jury that if they believed from the evidence that the plaintiff had proved the facts set forth in either count of his declaration, they ought to find for him. *Clemens v. Collins*, xiv. 604.

215. Where a correct legal principle is embodied in one instruction, it need not be repeated in another. *Williams v. Vanmeter*, viii. 339. *Pond v. Wyman*, xv. 175.

216. And where it is apparent that no injury has resulted from the instructions given, and that the judgment was for the right party, it is immaterial whether the instructions were erroneous or not. *Swearengen v. Orne*, viii. 707.

217. Where the plaintiff proves the facts set forth in his declaration, the court is not authorized to instruct the jury that the plaintiff cannot recover, for the reason that his declaration sets out no cause of action, or sets it out defectively. *Bury v. City of St. Louis*, xii. 298.

218. An instruction presenting different and inconsistent views of the same matter, is erroneous. *Wood v. St. Bt. Fleetwood*, xix. 529.

219. And so are contradictory instructions. *Schneer v. Lemp*, xvii. 142.

220. In an action of covenant, the breach assigned was that the defendant had no right to sell, on which issue was taken. On the trial the plaintiff proved the covenant, eviction by one claiming under the defendant, and the consideration paid by the plaintiff—*Held*, that an instruction on this evidence, that the plaintiff had not made a case, was erroneous. *Collins v. Clamorgan*, v. 272.

221. In an action for the loss of a keel boat, alleged to have been sunk by the carelessness of defendants, an instruction "that the defendants, or so many of them as were owners of the steamboat at the time of hiring the keel boat, are liable, if the loss of the keel was occasioned by the omission of ordinary care on the part of the officers or hands employed on the steamboat," and requiring the jury to inquire whether there was such care, in running the boat in the night, after a storm arose, &c., does not assume facts properly to be found by the jury. *Chouteau v. Uhrig*, x. 62.

222. In an action to recover compensation for raising and taking care of a child, where there is some evidence to show that the services were gratuitous, it is error to instruct the jury that the defendant is liable, unless a positive agreement to the contrary is shown. *Coleman v. Roberts*, i. 97.

223. Where it is necessary to find a demand and refusal, it is error for the court to give an instruction that the refusal must be of a definite character. *Kyle v. Hoyle*, vi. 526.

224. It is erroneous, after permitting the testimony of a witness to go to the jury, to instruct them to disregard it if they should find that the witness was interested. *Chouteau v. Searcy*, viii. 733.

225. After the court, on motion of a party, has excluded evidence, and the same party subsequently submits the same evidence to the jury, he cannot require the court to instruct the jury to disregard it. *Bailey v. Ormsby*, iii. 580.

226. Instructions should not be given unless supported by the evidence. *Harrison v. Cachelin*, xxvii. 26.

227. An instruction asked by one party, which excludes from the consideration of the jury questions raised by the evidence of the opposite party, is erroneous. *Clark v. Hammerle*, xxvii. 55.

228. Where a party has introduced in evidence affidavits not objected to, the other party cannot, it seems, ask that the jury be instructed that the affidavits are not evidence of the facts therein stated. *City of St. Louis v. Toney*, xxi. 243.

b. FORM AND WORDING.

229. Where an instruction is given with reference to the provisions of a particular statute, it should contain the language of the statute. *Per Scott, J. Jacobs v. McDonald*, viii. 565.

230. Instructions given in the words of the attachment law are sufficient. *Beach v. Baldwin*, xiv. 597.

231. The use of the words "*bona fide*," in instructions given to a jury, will not vitiate them. *Johnson v. Sullivan*, xxiii. 474.

c. ORAL.

232. Although the law prohibits oral instructions, yet, if they are given, the party who is aggrieved thereby can alone complain. *Hogel v. Lindell*, x. 483.

233. It is error for the judge, on refusing an instruction, to accompany it with remarks calculated to mislead the jury. *Biehler v. Coonce*, ix. 343.

d. ABSTRACT AND IRRELEVANT.

234. If instructions are asked which have no relation to the issue, they should not be given, although they may contain correct abstract principles. *Drury v. White*, x. 354.

235. The court is not bound to give instructions upon abstract points of law. The proper state of facts must exist to warrant the instructions asked. *Donohoe v. Glasgow*, i. 505.

236. It is erroneous to instruct the jury to find for a party upon the supposition that they find a certain fact is true, where there is no evidence of the existence of such supposed fact. *Chouteau v. Searcy*, viii. 733.

237. Instructions which contain mere abstract legal propositions, not arising necessarily from the facts of the case, ought not to be given. *Greely v. McNabb*, xiii. 596. *Hofelman v. Valentine*, xxvi. 393. *Hasse v. Lemp*, xxvi. 394.

238. It is no error to refuse an instruction based upon a state of facts of which there is no evidence, or the principle of which is embodied in another instruction given. *Rogers v. McCune*, xix. 557.

e. HYPOTHETICAL.

239. Where there is alternative evidence, the court should instruct the jury hypothetically. *Watson v. Musick*, ii. 29.

240. Hypothetical instructions must be grounded on evidence tending to prove the facts supposed. *Craighead v. Wells*, xxi. 404.

241. But it need not be conclusive. It is sufficient if it have any tendency to establish them. *Bradford v. Pearson*, xii. 71.

242. It is competent for the court to give instructions upon any supposed state of facts which any evidence in the case may tend to establish. *Flournoy v. Andrews*, v. 513.

f. WHICH ASSUME FACTS IN ISSUE.

243. An instruction which assumes the existence of a fact in issue is erroneous. *Thompson v. Botts*, viii. 710.

g. WHICH COMMENT ON THE EVIDENCE.

244. It is improper to instruct a jury that they must believe the answer, unless they believe that the respondent "swore falsely." *Gamble v. Johnson*, ix. 597.

245. Instructions which are mere comments upon evidence are properly refused. *Carroll v. Paul*, xvi. 226. *The State v. Homes*, xvii. 379.

246. Where a jury are instructed that certain circumstances would justify the conclusion that a conveyance was fraudulent in fact, in a case where there is no presumption of law to guide them, this is a summing up of the evidence, not an instruction on a question of law. *McDermott v. Barnum*, xix. 204.

247. If the Supreme Court send a cause back for a new trial, the court below should not give to the jury, in the authoritative form of an instruction, the comments of the Supreme Court on the evidence, without suitable explanations of the province of the jury. *Lochner v. Home Mutual Insurance Co.*, xix. 628.

h. WHICH REFER QUESTIONS OF LAW TO THE JURY.

248. The jury must take the law from the court, and it is error for the court to allow them to consult law books for themselves. *Barker v. Pool*, vi. 260. *Hardy v. The State*, vii. 607.

249. It is error to instruct the jury that the defendants must prove every material averment in their plea of usury, before the issue on such plea can be found for them, as it refers to the jury to determine the materiality of the averments, which is a question of law. *Fugate v. Carter*, vi. 267. *Hickey v. Ryan*, xv. 62.

250. So it is error to instruct the jury to disregard all evidence in explanation of any ambiguity, latent or patent, in the deed given in evidence, since it is the business of the court to determine the character of the supposed ambiguity, whether latent or patent. *Newman v. Lawless*, vi. 279.

i. CORRECTING ERRORS IN.

251. Where erroneous instructions are given for one party, the error is not corrected by giving instructions explanatory or contradictory of them for the other party. The erroneous instructions should be expressly withdrawn. *Jones v. Talbot*, iv. 279. *Hickman v. Griffin*, vi. 37.

j. CONSTRUCTION OF.

252. Instructions should not be so given as to leave a jury to conjecture their meaning, when that meaning is contrary to their obvious import. *Medlin v. Brooks*, ix. 105.

253. As to the construction of an instruction. *Doane v. Newman*, x. 69.

k. OBJECTIONS TO, WHEN TO BE TAKEN.

254. Objections to instructions must be made when given, and cannot be raised on motion for a new trial. *Powers v. Allen*, xiv. 367.

l. AS TO THE WEIGHT OF EVIDENCE.

255. Where a deposition of a Notary Public concerning the protest of a bill of exchange and notice to indorsers, contains relevant but not sufficient evidence to prove a legal notice, it is error for the court to instruct the jury that "there is nothing contained in the deposition to support the material allegations of the declaration." *Robinson v. Johnson*, i. 434.

256. It is error to instruct the jury upon the weight and sufficiency of evidence. *Schneer v. Lemp*, xvii. 142. *Labeaume v. Dodier*, i. 618. *Glasgow v. Copeland*, viii. 268.

257. Such an instruction is erroneous where there is the least evidence, direct or inferential, in support of the issue. *Emerson v. Sturgeon*, xviii. 170. *Rippey v. Friede*, xxvi. 523. *Hughes v. Ellison*, v. 110. *Morton v. Reeds*, vi. 64. *Scoggins v. Wilson*, xiii. 80.

258. So it is error to instruct the jury that there is no evidence in support of a fact or issue, where there is any, although the slightest. *Obouchon v. Boon*, x. 442. *Hays v. Bell*, xvi. 496.

259. In an action of trover for a slave, where the plaintiff proved that the defendant, who was a negro dealer, purchased the slave of the mother of the plaintiff, knowing her to have only a life estate in him, and was seen with the slave in his possession a few days after the sale, it is error for the court to instruct the jury that there was no evidence of conversion, and no sufficient evidence of title, and that the plaintiff had not made out a *prima facie* case. The weight of evidence should be left to the jury. *Speed v. Herrin*, iv. 356.

260. It is not proper for the court to instruct the jury that one fact may be presumed from another fact proved, unless such presumption be one of law. *Glover v. Duhle*, xix. 360.

261. The plaintiff gave written and parol evidence, none of which was attempted to be met by counter evidence, and then moved the court to instruct the jury that he had shown a legal title—*Held*, that such instruction was erroneous, as it amounted to an instruction that the jury must believe the evidence. *Bryan v. Wear*, iv. 106. *Vaulx v. Campbell*, viii. 224. *Garesche v. Boyce*, viii. 228.

262. Where a plaintiff offers evidence to prove his allegations, it is error for the court to instruct the jury that no evidence was offered which would warrant the jury in finding a verdict for the plaintiff. *Houghtaling v. Ball*, xix. 84. *Morse v. Maddox*, xix. 451.

III. ITS LEGAL EFFECT.

263. After the plaintiff's testimony is closed, the defendant has a right to instructions from the court upon the case made by the plaintiff, and it is error for the court to refuse them upon the plaintiff's suggestion that he intends eliciting further testimony in support of his claim on cross-examination of the defendant's witnesses. The plaintiff is not at liberty, on cross-examination, to give evidence in chief which he should have produced to establish his cause of action. *Rucker v. Eddings*, vii. 115.

264. It is the province of the court to determine upon the legal effect of testimony, and an instruction that, admitting the testimony to be true, the plaintiff cannot recover, is in the nature of a demurrer to evidence, and may well be given. *Harris v. Woody*, ix. 112. *Lee v. David*, xi. 114.

265. But it is not error, under the new system of practice, to refuse a general instruction of that kind. *Folden v. Hendrick*, xxv. 411.

266. Where there is no evidence going to prove a material point in a cause, the court should instruct the jury to that effect if called upon to do so. *Russell v. Barcroft*, i. 662.

267. Where there is no testimony in the case bearing upon a particular point, it is not necessary for the court to inform the jury of that fact. *Neale v. McKinstry*, vii. 128.

See *INFRA*, 323-325; . . . *SUPRA*, 195-197.

XI. VERDICT AND DAMAGES.

268. When a statute allows double damages, the amount found by the jury is to be doubled by the judgment of the court, and the law is not satisfied by

adding one half to the amount found by the jury. *PETTIBONE, J., dis. Withington v. Hilderbrand*, i. 280.

269. The doubling of the amount found by a jury, under a statute allowing double damages, is in the nature of a penalty imposed by law, and which the court are to add to the verdict; and it is doubtful whether, if the damages when doubled exceed the damages laid in the declaration, it would be error, but certainly not when the declaration contains two counts, each claiming damages, and the amount of the two together is greater than that awarded by the judgment. *PETTIBONE, J., dis. Ibid.*

270. The jury must find all that is put in issue; otherwise the verdict is bad. Therefore, where, in an action for assault and battery, defendant pleads not guilty, and *son assault demesne*, and the jury return a verdict of guilty, generally, without noticing the second plea, the verdict will be set aside on a motion in arrest of judgment. *Fenwick v. Logan*, i. 401.

271. Where a defendant in replevin pleaded—*first*, property in himself and others—*second*, property in himself alone—and *third*, property in another, and the jury found the first issue for defendant, and made no finding on the other issues—*Held*, that as the finding decided the rights of the parties, and no judgment could have been given for the plaintiff if the other issues had been found for him, the verdict was sufficient. *Ramsey v. Waters*, i. 406.

272. The jury must find upon all the issues. If they do not, the judgment should be arrested. *Hickman v. Byrd*, i. 495.

273. In an action of assumpsit the defendant pleaded a set-off, to which the plaintiff replied that "he did not owe," &c.—*Held*, that the finding of the jury, "that the plaintiff did not undertake and promise," &c., is sufficient. *Carter v. Blankenship*, iii. 583.

274. Where there are several allegations, and as many issues, the jury should find on each issue, but a general verdict is not fatally defective. *Talbot v. Jones*, v. 217.

275. A verdict will not be set aside because of words spoken to a juror by a bystander, when no misconduct is charged upon the juror or the party in whose favor the verdict is rendered. *Stewart v. Small*, v. 525.

276. Where there is an entire want of evidence against one of several defendants, in an action *ex contractu*, the court, under the statute, (Acts 1838-9, 99, § 1,) may direct the jury to find a verdict as to him, the same as in actions *ex delicto*. *Campbell v. Hood*, vi. 211.

277. Where a verdict is merely informal, the court may put it in proper form; and where there is a substantial omission, it may be supplied by the court, with the consent of the jury, so as to make it conform to their intention. *Henley v. Arbuckle*, xiii. 209.

278. If there be one good count in the declaration, a general verdict, assessing damages, is good. *Clemens v. Collins*, xiv. 604.

279. Where several causes of action are joined in one petition, there should be a separate assessment of damages, or verdict in each cause. *Mooney v. Kennett*, xix. 551.

280. After a jury has returned a special verdict, the court should not submit

the case to them for a general verdict with instructions. *Spalding v. Mayhall*, xxvii. 377.

XII. IRREGULARITY, WHEN TO BE TAKEN ADVANTAGE OF.

281. After a verdict for the plaintiff, it is too late to raise the objection that the replication was not filed within the time prescribed by the statute. *Magehan v. Orme*, vii. 4. See SUPRA, I.

282. Plaintiffs sued out a *scire facias* on a recognizance of appeal. At the return term the court permitted the original judgment and recognizance to be amended on motion of the plaintiff. The defendants then pleaded *nul tiel record*, and issue was joined thereon. Upon the trial of this issue the defendants objected to the reading of the judgment and recognizance, because the amendments were improperly made—*Held*, that the objection was not taken in time. The defendants should have objected at the time the amendments were made, and saved their objections by a bill of exceptions. *Snowden v. Camden*, viii. 502.

XIII. INCIDENTAL PROCEEDINGS.

a. BILL OF PARTICULARS.

283. Where the court has ordered the defendant to file a bill of particulars of a set-off, of which he had given notice, and he fails to comply with such order, it is competent for the court to exclude all evidence on that subject. *Haden v. Herndon*, ix. 854.

b. NOTICE TO PRODUCE PAPERS.

284. Where the nature of the proceedings shows that the object of them is to charge the defendant with the possession of a paper, it is not necessary to give him notice to produce it. *Hart v. Robinett*, v. 11. *Hart v. Spencer*, v. 17.

See EVIDENCE, 62–64.

c. NOTICE OF MOTION.

285. Where a judgment was assigned, and the debtors, with notice of such assignment, paid the amount to the judgment creditor, who thereupon indorsed the amount on the execution, directing the sheriff to return the same satisfied—*Held*, that such indorsement might be vacated on motion, and a new execution issued for the benefit of the assignees; but before such order could be made, all the judgment debtors were entitled to notice. *Laughlin v. Fairbanks*, viii. 367.

286. Where an immaterial issue, tendered by the plaintiff, is found for the defendant, and it appears from the record that the awarding of a replender is unnecessary to effect substantial justice, judgment will be given for the plaintiff, *non obstante veredicto*. *Shreve v. Whittlesey*, vii. 473.

d. SECURITY FOR COSTS.

287. Where a party is ruled to give security for costs on or before a specified day in vacation, and fails to do so until the next term, but then offers it, before a motion to dismiss is made, it should be received. *Brown v. Ravenscroft*, i. 397.

XIV. BILL OF EXCEPTIONS.

a. GENERALLY.

288. Where evidence is given by each party to a suit, and no points decided by the court have been saved by a bill of exceptions, the verdict will not be disturbed unless glaringly wrong. *Young v. Kelly*, ix. 50.

289. It is the duty of the plaintiff in error to show by his bill of exceptions the errors of the inferior court. The presumption is in favor of the judgment of that court. *Riney v. Vanlandingham*, ix. 807.

290. Whether a copy of the note or account sued on accompanied the petition, is matter *in pais*, and can only be put on the record by a bill of exceptions. *Kearney v. Woodson*, iv. 114.

291. A variance between the declaration and the bond sued on may be remedied by amendment, and, if the bill of exceptions shows that it was permitted and made, it does not matter that the declaration itself, as it purports to be copied in the records, appears not to have been altered. *Fulkerson v. The State*, xiv. 49.

292. As to the requisites of a bill of exceptions. *The State v. Shehane*, xxv. 565. *Frazer v. Yeatman*, x. 501.

293. Where an objection is overruled, the party objecting, if he wishes to save the point, must except. *Shelton v. Ford*, vii. 209. *Vaulx v. Campbell*, viii. 224.

b. MAKING UP.

294. In making a bill of exceptions, the court may recall and interrogate a witness as to what he swore on the trial, and, in such case, neither party has a right to examine him. *Whitmore v. Coats*, xiv. 9.

c. SIGNING.

295. The court is not bound to sign a bill of exceptions on any matter but such as arose on the trial, and was excepted to at the time. *Davis v. Burns*, i. 264.

296. Exceptions must be taken at the time at which the trial is had, and the bill prepared and signed during the term, and not afterwards, unless it is so consented to. *Diepenbrock v. Shaw*, xxi. 122. *Sutter v. Streit*, xxi. 157. *The State v. McO'Blenis*, xxi. 272. *Farrar v. Finney*, xxi. 569. *Wilcoxson v. McBride*, xxiii. 404. *Ellis v. Andrews*, xxv. 327. *Pomeroy v. Selmes*, viii. 727. *Hassinger v. Pye*, x. 156.

297. And where it is agreed that the bill of exceptions may be allowed, and filed within ten days after the term, and it is not filed within that time, it is too late to do so afterwards. *Ellis v. Andrews*, xxv. 327.

298. Although exceptions must be taken to the decisions of the court at the time the decision is made, it is not necessary that a bill of exceptions should then be made out and signed. One bill of exceptions, made at the conclusion of the case, is sufficient to embrace all the exceptions taken during the trial. *Lane v. Kingsberry*, xi. 402.

299. Where a bill of exceptions has not been signed in due season, the other party is not precluded from moving to strike out the exceptions, simply because he has filed his joinder in error. *Farrar v. Finney*, xxi. 569.

300. If a judge improperly refuses to sign a bill of exceptions, his error cannot be corrected by appeal. The Supreme Court will not notice a bill of exceptions not signed. *Darrah v. St. Bt. Lightfoot*, xvii. 276.

301. The commission of the judge, before whom a motion for a new trial was argued, expired before the motion was decided, or a bill of exceptions signed. A bill of exceptions was subsequently made up and signed by his successor—*Held*, that the incoming judge had no authority to sign the exceptions without the consent of the opposite party, as it was necessary that such exceptions should be taken in the progress of the trial. (See R. S. 1835, 464, § 20.) *Consaul v. Lidell*, vii. 250. [But see R. S. 1855, 1264, § 28.]

d. EXCEPTIONS—WHEN TO BE TAKEN.

302. Exceptions to erroneous rulings must be taken in the progress of the trial, and to erroneous instructions when they are given. (See R. S. 1835, 464, § 20.) *Randolph v. Alsey*, viii. 656.

303. After the jury have returned their verdict, it is too late to except to the instructions of the court. *Bompart v. Boyer*, viii. 234. *Mattingly v. Moranville*, xi. 604.

304. A bill of exceptions, concluding thus, “to which several decisions of the court, the defendant excepted at the moment,” shows that the exceptions were properly taken to the giving and refusing of instructions. *St. Bt. Raritan v. Smith*, x. 527.

305. Where the court improperly grants a new trial, and the party complaining, wishes to avail himself of the error, he must tender his exceptions, and abandon the case at that point. *Davis v. Davis*, viii. 56. *Samuel v. Morton*, viii. 633.

e. EVIDENCE.

aa. Generally.

306. In order to enable the Supreme Court to determine whether there is error in the judgment of the court below, the evidence and proceedings must be preserved in a bill of exceptions. *Gale v. Pearson*, vi. 253. *Crane v. Taylor*, vii. 285. *Brown v. Brown*, vii. 288. *Bernarder v. Langham*, vii. 476. *Martin v. Hagan*, viii. 505.

307. A judgment will not be reversed for giving erroneous instructions, or refusing those which are correct, where the evidence is not preserved. *Cawthorn v. Muldrow*, viii. 617. *Campbell v. The State*, ix. 351. *Bellissime v. McCoy*, i. 318. *Samuel v. Withers*, ix. 165.

308. Or for admitting the testimony of an incompetent witness, unless such testimony is so preserved. *Samuel v. Withers*, ix. 165.

309. But it is necessary to set out only so much of the evidence as tends to establish a fact, upon which the principle of law is raised. *Wallace v. Boston*, x. 660.

310. All reasonable presumptions will be made in support of the judgment below. *M'Girk v. Chauvin*, iii. 236. *Magehan v. Orme*, vii. 4. *Ingram v. The State*, vii. 293.

311. And unless the bill of exceptions purports to recite the whole evidence, the Supreme Court cannot determine whether the court below erred in granting or refusing a new trial. *Searcy v. Devine*, iv. 626. *Hughes v. Ellison*, v. 110.

312. But where it clearly appears from the proceeding that no other evidence was given, it will be assumed that the exceptions contain all the evidence. *Gamble v. Hamilton*, vii. 469.

313. A bill of exceptions, detailing certain evidence, and then concluding, "whereupon the court decided," &c., does not show that it contains all the evidence given. *Foster v. Nowlin*, iv. 18.

314. But it is not necessary to give details of testimony excluded, not on account of any incompetency or informality, but upon the general ground that the claim or defense designed to be sustained by it, is unavailing. *Per* NAPTON, J. *St. Bt. Lehigh v. Knox*, xii. 508.

315. On a petition and motion to set aside a sale of land made by a sheriff, the motion was overruled, and the bill of exceptions not showing that any evidence was submitted, the judgment of the court below was presumed to be correct. *Mead v. Matson*, ix. 773.

316. Where it does not appear that the plaintiff in ejectment, offered any evidence in support of his title, the judgment of the court below, in favor of the defendant, will not be reversed because of the admission of incompetent testimony in his behalf. *Hill v. Groom*, v. 58.

317. A report of a referee, to whom a cause had been referred under the new code, (Acts 1848-9, 91, § 3,) stands as the decision of the court, and the Supreme Court will not review the same upon the facts, unless the evidence be preserved in a bill of exceptions. *Hays v. Hays*, xxvi. 123.

bb. *Objections to.*

318. Objections to the admissibility of evidence must be taken as the evidence is offered, or the objections are waived. *Waldo v. Russell*, v. 387.

319. Where the admission of evidence is objected to, such objection, together with the testimony, must be saved in the bill of exceptions. *Withington v. Young* iv. 564.

cc. *Grounds of objection.*

320. The refusal to receive in evidence a bill of sale, is no reason for reversing a judgment, when the bill of exceptions does not show the ground on which it was rejected. *Ramsey v. Waters*, i. 406.

321. The bill of exceptions must show the specific ground upon which evidence was objected to, or the objection cannot be considered in the Supreme Court. *Fields v. Hunter*, viii. 128.

dd. *Depositions.*

322. Where the court overrules a motion to exclude depositions on account of alleged informalities in their execution; and the fact of such informalities existing

is not preserved by exceptions, the court above cannot know but that the court below overruled the motion, because the facts were falsely stated therein. *Davidson v. Peck*, iv. 438.

f. INSTRUCTIONS.

323. Where erroneous instructions are given, the party aggrieved thereby must except to them, in order to preserve the objection. *Robinson v. Shepard*, viii. 136.

324. It is not necessary, in a bill of exceptions, to set out all the evidence except where the verdict is alleged to be against evidence. If the rejection of evidence, or the refusal of instructions be complained of, it is sufficient to show the evidence offered, and that the evidence properly raised the question in the instruction. *Barge Resort v. Brooke*, x. 531.

325. The Supreme Court will not consider instructions not incorporated in the bill of exceptions. *McLain v. Winchester*, xvii. 49.

g. MOTIONS.

326. The decisions of the Circuit Court upon motions, or its opinion on points not presented by an issue of law, must be saved by a bill of exceptions; otherwise, the Supreme Court will not consider them. *Hammond v. Relf*, i. 232. *Butcher v. Keil*, i. 262. *Davis v. Hays*, i. 270.

327. A motion is no part of a record until so made, by incorporating it into a bill of exceptions. *United States v. Gamble*, x. 457. *Christy v. Myers*, xxi. 112. *Loudon v. King*, xxii. 336.

328. A new trial will not be granted, unless the motion for a new trial was made in the court below, and the grounds on which it was asked, are preserved in a bill of exceptions. *Benoist v. Powell*, vii. 224.

329. A bill of exceptions is a part of the record, and must show that the facts alleged in support of a motion for a re-hearing, occurred in the course of the trial, and not simply that certain reasons were assigned for a new trial. *Bartlett v. Draper*, iii. 487.

h. FINDING OF FACTS.

330. The finding of facts is a part of the record, and need not be preserved in a bill of exceptions. *Ragan v. McCoy*, xxvi. 166.

i. INQUIRY OF DAMAGES.

331. It is the duty of the Circuit Court to instruct the jury on all principles of law applicable to the evidence in the case, but the bill of exceptions must show what instructions were given or refused, to enable this court to judge whether there was error. *McKnight v. Wells*, i. 13.

332. The fact that it appears from the entry of the judgment, that the inquisition of damages was taken "without any proof" of the amount of damages sustained, is insufficient. The exceptions must show that the inquisition was improperly had. *Grump v. Dunnivant*, xxiii. 254.

j. AFFIDAVITS.

333. Where a motion is made to set aside a judgment and grant a continuance, because of certain facts set forth in affidavits, the affidavits must be made a part of the record by being preserved in a bill of exceptions. *Pratt v. Rogers*, v. 51.

k. PAPER NOT FILED OR FILED WITHOUT LEAVE.

334. Papers tendered to the court, but not permitted to be filed, and such as are filed without leave, and treated afterwards as mere nullities, are not a part of the record, unless preserved by bill of exceptions; but it is otherwise as to pleadings regularly taken and entered in the progress of a cause. *Mayfield v. Sweringen*, iv. 220.

See BOND, VII; . . . EVIDENCE, 145-153; . . . JUDGMENT, X; . . . PETITION IN DEBT, II.

PRACTICE IN SUPREME COURT.

I. GENERALLY.

II. AS TO THE RECORD.

III. MATTERS OF DISCRETION.

IV. EVIDENCE.

V. INSTRUCTIONS.

VI. NON-SUIT.

VII. TRIAL OF QUESTIONS OF FACT BY THE COURT.

VIII. CHANCERY.

IX. DAMAGES.

X. EXECUTION.

I. GENERALLY.

1. Where, in an action of debt, the plaintiff, after plea and joinder of issue, obtains leave to amend, and files an amended declaration in assumpsit, and at a subsequent term takes judgment by *nil dicit*, it is irregular, but where the court below was not called on to decide such question of irregularity, the judgment will not be reversed. *Harly v. Holmes*, i. 84.

2. Error in *fact* can only be corrected in the court where it occurred, or in which the record is; therefore, where judgment was rendered in the Circuit Court against two defendants, where one of them was, at the time of rendering the judgment, deceased, it is not such an error as the Supreme Court will correct. *Calloway v. Nifong*, i. 223.

3. Where the clerk has failed to enter the whole finding of the jury, the Supreme Court cannot amend the judgment entry, there being nothing to amend by. *Easton v. Collier*, i. 421.

4. Under the act of December 12th, 1820, (1 Ter. L. 719, § 15,) a judgment for a greater amount of damages than that laid in the declaration, will be examined and reversed. *Carr v. Edwards*, i. 137.

5. Where there are two issues found in favor of defendant, and the error complained of relates to but one of them, the Supreme Court will not reverse the judgment. *Taylor v. McKnight*, i. 278.

6. Where it appears upon the whole record that judgment was rendered for the right party, it will be affirmed, although errors may exist against the party seeking to reverse it. *Tate v. Barcroft*, i. 163. *Dube v. Smith*, i. 313. *Wear v. McCorkle*, i. 588. *Wathen v. English*, i. 746. *Crocker v. Mann*, iii. 472.

7. So where it does not appear upon what matter the Circuit Court decided, its judgment will be taken to be correct. *Coleman v. McKnight*, iv. 83.

8. No point will be considered which was not made in the court below. *Cornelius v. Grant*, viii. 59. *Alexander v. Hayden*, ii. 211.

9. Every reasonable intendment will be made in support of the judgment; but nothing will be presumed in favor of the party whose duty it was to have made the doubtful matter plain. *Morgan v. Taggart*, i. 403. *Collins v. Bowmer*, ii. 195. *Stewart v. Small*, v. 525. *Vaughn v. Montgomery*, v. 529. *Dodson v. Johnson*, vi. 599. *Small v. Hempstead*, vii. 373.

10. But presumptions will not ordinarily be made in aid of *ex parte* proceedings. *Harryman v. Titus*, iii. 302.

11. The judgments of the Circuit Court, on motions for continuance or for new trial, will be presumed to be correct until the contrary appears. *Steel v. McCutchen*, v. 522.

12. A judgment will not be reversed because a motion was made in the court below to rule the plaintiff to give security for costs, when the motion was not acted on. *Morgan v. Taggart*, i. 403.

13. Nor on account of a mere irregularity, by which the party complaining has sustained no injury. *Payne v. Collier*, vi. 321.

14. Nor on account of erroneous instructions, where the party complaining has shown no right of action. *Newman v. Lawless*, vi. 279.

15. Nor for erroneous decisions against the recovering party. *McFadin v. Rippey*, viii. 738.

16. Where a declaration is defective for want of an averment of a fact necessary to be proved in order to a recovery, it will be held good after verdict on motion in arrest. *Frost v. Pryor*, vii. 314.

17. But where the evidence preserved in the bill of exceptions negatives the inference that such proof was made, the verdict will be set aside. *Ibid.*

18. Errors in the judgment of the Circuit Court, in departing from the pleadings or verdict, will be noticed by the Supreme Court, although no objection be taken in the court below. *Hempstead v. Stone*, ii. 65.

19. After the court has given judgment on demurrer, the same matter is not open to be urged in arrest. *Freeman v. Camden*, vii. 298.

20. Where a demurrer to a plea, tendering an immaterial issue, is improperly overruled, and there is no replication, and the jury find a verdict for the plaintiff, on a supposed issue which did not exist, the Supreme Court will not reverse the judgment below, on account of such verdict, when it is fully sustained by the finding of other issues in the case. *Kyle v. Hoyle*, vi. 526.

21. A judgment will not be reversed unless it appears that error was committed materially affecting the merits of the case, (Acts 1848-9, 94, §. 17.) *Gobin v. Hudgens*, xv. 400. *Shepard v. Bank of Missouri*, xv. 143.

22. The judgment of the court above, on an appeal from a justice, will be affirmed in the Supreme Court, if there is no statement or bill of exceptions or error apparent on the record. *Moore v. Turner*, xix. 642. *Elliott v. Pogue*, xx. 263. *Aiken v. Todd*, xx. 276. *Sickles v. Abbott*, xxi. 443. *Southerland v. Warner*, xxi. 512.

23. In a suit under the statute, (R. S. 1855, 1571, §§ 30, 31,) to contest the validity of a will, the Supreme Court will review the proceedings of the lower court only in matters of law. *Letton v. Graves*, xxvi. 250.

24. A party to a suit has no right to the reversal of a judgment therein for errors that do not in any way affect him, but other of the parties alone. *Papin v. Massey*, xxvii. 445.

II. AS TO THE RECORD.

25. The Supreme Court will take notice of such facts only as appear of record. *Nicholas v. The State*, vi. 6.

26. And where a record is capable of two interpretations, that will be given which will sustain the judgment. *Perpetual Insurance Co. v. Cohen*, ix. 416.

27. And will presume that the proceedings of the inferior court are correct, unless the record shows the contrary. *Walter v. Cathcart*, xviii. 256.

28. Where there is a diminution of the record, the court, on application, will issue a *certiorari* commanding the court below to send up the full record. *Gale v. Pearson*, vi. 253.

29. To entitle a party to the benefit of objections to any proceedings in the court below it must appear, by the record, that the objections were made in that court. *St. Bt. Thames v. Erskine*, vii. 213.

30. The Supreme Court cannot review the action of the inferior court upon a motion to strike out parts of an answer, when they are referred to in the record only by line and page of the original. *Robinson v. Rice*, xx. 229.

III. MATTERS OF DISCRETION.

31. The Supreme Court will not interfere with the exercise of a discretionary power vested in the court below, unless, perhaps, under peculiar circumstances. *Caldwell v. McKee*, viii. 334.

32. The discretion of the court below will not be reviewed in a matter relating

to the construction and interpretation of its rules, except in flagrant cases. *Funkhouser v. How*, xviii. 47. *The State v. Fenly*, xviii. 445.

33. Thus where, by a rule of the St. Louis Circuit Court, leave to plead is refused upon overruling a special demurrer, a judgment entered up in accordance with such rule will not be disturbed. It is a matter of practice within the discretion of the Circuit Court. *St. Bt. Reveille v. Case*, ix. 498.

34. Nor will an order setting aside a judgment by default be reversed, unless it be a case of gross error. *Laurent v. Mullikin*, x. 495.

35. Nor will the judgment of the court below, refusing to set aside a judgment by default, be interfered with where it appears that there had been gross negligence on the part of the defendant. *Faber v. Bruner*, xiii. 541.

36. Not even to let in a defense which would have been available had it been seasonably made. *Wimer v. Morris*, vii. 6. *Wagemann v. Jordan*, xix. 503.

37. The Supreme Court will not interfere with the discretion exercised by inferior courts in taxing costs against a losing party. *Walton v. Walton*, xix. 667.

38. Nor in discharging a jury in a civil case, after deliberation and failure to agree. *Hamiltons v. Moody*, xxi. 79.

39. Nor in refusing to put the plaintiff to an election as to which of several breaches he will rely upon, unless in a case of unusual hardship. *Fulkerson v. The State*, xiv. 49.

40. Nor in refusing to grant a motion for a continuance on an affidavit that a party was sick and not able to be present in court. *Owens v. Tinsley*, xxi. 423.

41. Nor where the court, upon the last day of the term, refused to enter upon the trial of a jury cause, and continued it. *Hall v. Woodson*, xiii. 462.

42. In an action on a note, the defendants pleaded the general issue, with notice of set-off. The cause was continued from term to term, when leave was given the defendants by the court to file an amended plea denying the execution of the note. Under this state of facts this court will not interfere with the discretion exercised by the Circuit Court in allowing the amended plea. *Pomeroy v. Brown*, xix. 302.

IV. EVIDENCE.

43. Where objections to the reading of depositions are made in the court below, but the grounds of objection are not specified, the objections will not be examined in the Supreme Court. *Bank of Missouri v. Merchants' Bank of Baltimore*, x. 123. *Roussin v. Perpetual Insurance Co.*, xv. 244.

44. And the specific grounds of objection must be stated. *Duval v. Ellis*, xiii. 203.

45. Where evidence is objected to as irrelevant, the Supreme Court cannot settle the point, unless all the evidence is preserved. *McMillen v. The State*, xiii. 30.

46. Judgment will not be reversed because irrelevant testimony was admitted, unless it is calculated to mislead or prejudice the jury. *McDermott v. Barnum*, xix. 204.

47. Nor where a party is permitted to give in evidence his own declarations to prove a fact, if the same fact was established by other and legal testimony. *Bradford v. Pearson*, xii. 71.

48. Nor because competent evidence was rejected, unless it appears on the record that the evidence might have had some influence in finding the verdict. *Roussin v. Perpetual Ins. Co.*, xv. 244.

49. Nor unless an exception to the ruling was taken at the time of the trial. *Lee v. Lee*, xix. 420.

50. Nor because a leading question was permitted to be asked a witness. *Rogers v. McCune*, xix. 557.

51. Nor where the evidence rejected is too vague and indecisive to affect the finding of the facts. *Conrad v. Belt*, xxii. 166.

52. Nor for the admission of evidence objected to, unless an exception is saved, nor for the admission of irrelevant evidence, unless it was calculated to prejudice or mislead the jury. *Craighead v. Wells*, xxi. 404.

53. Where a record purports only to give the substance of the evidence bearing on particular points, the judgment will not be reversed on the ground that there was no evidence upon which to base a particular instruction, unless the evidence bearing on that instruction is stated, or it appears affirmatively that none was given. *Douglass v. Stephens*, xviii. 362.

V. INSTRUCTIONS.

54. A party is estopped from objecting in the Supreme Court to instructions given at his request. *Chamberlin v. Smith*, i. 482.

55. Where an instruction is given which is not strictly correct as a proposition of law, and might have misled the jury, and the finding was in accordance with the instruction, and the evidence in the case is not so preserved in a bill of exceptions as to enable the Supreme Court to judge whether the jury might not have been misled by it, the judgment will be reversed. *Brady v. Hill*, i. 315.

56. A party who seeks to reverse the judgment of the court below for refusing a new trial, where all the instructions asked by him were given, must make out a case free from doubt. *Bobb v. Lambdin*, vii. 601.

57. The judgment of the court below will not be reversed because of the refusal of an instruction which could not have availed the party asking it. *Withinton v. Withinton*, vii. 589.

58. Nor on account of an erroneous instruction, which, it is evident from the record, could not have prejudiced the party excepting. *Finnery v. Allen*, vii. 416. *Vaultx v. Campbell*, viii. 224. *Maston v. Fanning*, ix. 302. *Chouteau v. Uhrig*, x. 62.

59. Nor for a failure to instruct the jury where no instructions were asked. *Drury v. White*, x. 354.

60. Nor for the giving of instructions so utterly irrelevant that they could not have misled the jury; nor for the refusal to give abstract propositions of law

which could not assist the jury in deciding the case. *McLain v. Winchester*, xvii. 49.

61. Nor for refusing an instruction, the substance of which has been given in another form. *Maston v. Fanning*, ix. 302.

62. Although instructions asked by a party and refused by the court assert correct legal principles, according to the facts assumed by them, yet if the jury, by their verdict, negative the hypothesis upon which the instructions were based, the Supreme Court will not interfere with the judgment. *Patterson v. McClanahan*, xiii. 507.

63. But where erroneous instructions are given upon one branch of a case, the evidence will not be reviewed in order to ascertain whether or not the judgment is right upon all the facts. *Swartz v. Chappell*, xix. 304.

64. And where a cause is tried upon an agreed state of facts, the Supreme Court will reverse if the facts do not support the judgment, although no instructions are asked. *Stone v. Corbett*, xx. 350.

65. A judgment will not be reversed because instructions, abstractly erroneous, were given, if they did not affect the verdict. Where the propriety of instructions cannot be examined because the evidence on which they were based is not saved, the judgment will be affirmed. *Walter v. Cathcart*, xviii. 256. *The State v. Vaughn*, xxvi. 29.

66. The judgment will be reversed where the instructions are unintelligible. *Crole v. Thomas*, xvii. 329.

VI. NON-SUIT.

67. Where the plaintiff suffers a non-suit, and fails to move to set it aside, and no exceptions are taken, the judgment will not be disturbed, whatever the merits of the plaintiff's case. *Robbins v. Stevenson*, v. 105. *Crane v. Daggett*, x. 108.

68. Nor will the judgment be disturbed where the plaintiff voluntarily submits to a non-suit, upon the refusal of the court to strike out an insufficient answer. *Schulters v. Bockwinkle*, xix. 647. *Dumey v. Schoeffler*, xx. 323. *Louisiana and Middletown Plank Road Co. v. Mitchell*, xx. 432.

69. But the Supreme Court will not refuse to set aside a non-suit taken upon the rejection of material evidence necessary to the plaintiff's recovery, because the record does not show that the plaintiff was prepared with proof upon the other material facts of the case, or because the evidence may possibly have been rejected for the reason that it was offered out of the order of time prescribed by the court trying the cause. *Dowd v. Winters*, xx. 361.

VII. TRIAL OF QUESTION OF FACT BY THE COURT.

70. Where the facts of a case are submitted to the court, and it does not appear that there was error in the finding, the judgment will be affirmed. *Wiggins v. Hammond*, i. 121.

71. Nor will the judgment be reversed upon exceptions taken to the weight of evidence. *Cage v. Ellis*, i. 444.

72. Nor unless it is clearly against the weight of evidence. *Martin v. Withington*, iv. 518. *Craig v. Maupin*, vi. 250.

73. A judgment founded on a defective verdict of the court will not be reversed unless a motion in arrest was made and overruled in the court below. *Davidson v. Peck*, iv. 438. *Griffin v. Samuel*, vi. 50. *Finney v. The State*, ix. 624.

74. Where a cause is submitted to the court, sitting as a jury, the parties must, in order to avail themselves of error in the court, separate the matters of law from the matters of fact, and call the attention of the court expressly to the point to be decided. *Taylor v. Russell*, viii. 701. *Little v. Nelson*, viii. 709. *Fugate v. Muir*, ix. 351.

75. The judgment will not be set aside unless the record shows that the court below was called to decide some question of law, and that its decision was wrong. *VonPhul v. City of St. Louis*, ix. 48. *Vaughn v. Bank of Missouri*, ix. 375. *Clark v. Stevens*, x. 510.

76. The judgment will be affirmed where no exceptions are taken till after the verdict. *Kilgore v. Bonic*, ix. 288.

77. Under the new code, (Acts 1848-9, 90,) the judgment will be reversed for no finding of the facts, or for an insufficient finding. *Barbarick v. Reed*, xviii. 473. *Sloan v. Sloan*, xviii. 474. *Phelps v. Relfe*, xviii. 479. *Major v. Harrison*, xxi. 441. *Brant v. Robertson*, xvi. 129. *Bates v. Bower*, xvii. 550. (OVERRULING *Rucker v. Musick*, xvi. 316.) *Ragan v. McCoy*, xxvi. 166.

78. And so if the finding of facts is incomplete on its face. *Brant v. Robertson*, xvi. 129.

79. The party wishing a review of the finding of facts must make out a case setting forth the grounds on which he wishes a review, the fact or facts he wishes found differently, and the evidence bearing upon them. *Giboney v. Bedford*, xvii. 56.

80. Where no motion for a review is made, the Supreme Court will not review the finding of facts, but will affirm the judgment if the finding supports it. *Hughes v. Fitzpatrick*, xviii. 254.

81. And where the motion is not made in conformity to the new code, the judgment will be affirmed, if the facts found warrant the judgment rendered thereon. *Freeland v. Eldridge*, xix. 325.

82. The Supreme Court will look to the facts found, and decide without regard to instructions given or refused. *Robinson v. Rice*, xx. 229.

83. But where no instructions or declarations of law are asked or given, a new trial will not be ordered. *Kurlbaum v. Roepke*, xxvii. 161.

84. Where it is stipulated that a cause shall be decided in the Supreme Court upon the facts found by the court below, no other facts will be considered than those contained in the finding. *St. Louis Mutual Fire and Marine Ins. Co. v. Boeckler*, xix. 135.

85. The Supreme Court will look into the evidence to determine the sufficiency of the finding of facts. *Archer v. McMeekan*, xxi. 43.

86. Judgment reversed because the evidence did not support or justify the finding of the facts by the court. *Pipkin v. Allen*, xxiv. 520.

87. What particular figure is used in the date of a note is to be determined

by inspection, and, the court below having upon inspection determined that question, this court, especially in the absence of the original note, will not undertake to revise such determination. *Butterworth v. Ratcliff*, vii. 550.

VIII. CHANCERY.

88. Under § 42 of the act of 1825, regulating proceedings in chancery, (R. S. 1825, 645,) the facts on which the decree is founded must appear in the record, else, on an appeal to the Supreme Court, the decree will be reversed. *Laberge v. Chauvin*, ii. 179.

89. And depositions filed in a chancery suit, but not preserved on the record, cannot be used in the Supreme Court on appeal. (R. S. 1825, 645, § 42.) *Bean v. Valle*, ii. 126.

90. A decree in chancery will be reversed for uncertainty in the evidence given in support of the defendant's answer. *Banks v. McCarty*, v. 1.

91. Where a chancellor directs issues of fact to be tried by a jury, the finding is to be regarded as a verdict at common law, and will not be disturbed except in case of a clearly improper finding, or of misdirection by the court. *O'Bryan v. O'Bryan*, xiii. 16.

92. The Supreme Court cannot exercise original jurisdiction by ordering a chancery case, on appeal, to be referred to a commissioner. Where the court is not satisfied from the evidence in the bill of exceptions that the decree is correct, and no account was taken, so that it is impossible to state what errors were committed, the case will be reversed and remanded, with directions to the court below to have an account stated between the parties. *Knowles v. Mercer*, xvi. 455.

IX. DAMAGES.

93. It is not the practice of the Supreme Court to award damages upon the affirmance of a judgment when the case has been appealed without a *supersedeas*. *Haley v. Scott*, xviii. 202.

X. EXECUTION.

94. The Supreme Court may award execution to carry their judgments into effect. *McNair v. Lane*, ii. 57.

See CRIMINAL LAW, XX; . . . JUDGMENT, XIV; . . . NEW TRIAL.

PROCESS.

I. FORM AND DIRECTION.

II. DEFECTIVE PROCESS.

III. JUSTIFICATION UNDER PROCESS.

IV. EVIDENCE.

V. SERVICE AND RETURN.

- a. PERSONAL SERVICE.
- b. BY COPY.
- c. BY WHOM SERVICE SHOULD BE MADE.
- d. DEFECTIVE SERVICE CURED BY APPEARANCE.
- e. RETURN.
 - aa. Form and Requisites.
 - bb. Construction of.
 - cc. Validity.
 - dd. Defective Return.

I. FORM AND DIRECTION.

1. Where a summons is issued by a Justice, in which the cause of action is stated to be "on an account for fifty dollars," it is good in substance, and will be held to refer to a book account, and to be within the jurisdiction of the Justice. *Floyd v. Wiley*, i. 430.

2. Under the act of October 1, 1804, which provides that "all writs shall run in the name and style of the United States of America, and bear test in the name of the Chief Justice or presiding judge, and shall be sealed with the judicial seal of the said court," &c., (1 Ter. L. 61, § 10,) a writ, which was signed by two of the judges and sealed with their seals, and not with the judicial seal of the court, is not good, and gives no authority to the officer to whom it is directed. *Little v. Chauvin*, i. 626.

3. All writs must run in the name of the State, and the State and county being placed in the margin and separated by a line from the commencement of the writ, is not a running in the name of the State. *Fowler v. Watson*, iv. 27.

4. And such defect is not cured by an appearance. (R. S. 1835, 351, § 10—Const. Mo., Art. V, § 19.) *Little v. Little*, v. 227.

5. But, *per* SCOTT, J., the provisions of the constitution and of the statute, in reference to writs running in the name of the State, are directory merely, and do not make void the process because of its non-conformity with such provisions. *Davis v. Wood*, vii. 162.

6. "State of Missouri" and "the State of Missouri" express the same name, and a process in either form is good. *Spencer v. Medder*, v. 458.

7. In proceedings before a Justice against a constable, for not returning an execution, a summons to show cause why execution should not issue against him, &c., is sufficient, without specifying the particular statute under which the proceedings are taken. *Hart v. Robinett*, v. 11. *Hart v. Spence*, v. 17.

8. A summons to appear before the "Judge of the Circuit Court" on the first day of the next term of the court, to be held on a day certain, to answer to the "demand" of the plaintiff in petition in debt, is good. (See R. S. 1835, 451, § 8.) *Payne v. Collier*, vi. 321.

9. A summons issued by a Justice, requiring the defendant "to appear before one of the Justices," &c., "at my office," &c., and signed by the Justice officially, omitting the words "me," or the "undersigned," as used in the form set forth in the statute, (R. S. 1845, 639, § 13,) is sufficient. *Smith v. Young*, xi. 566.

10. *It seems* that in a suit against several defendants a summons may be issued against some, and an attachment against others. *Franciscus v. Bridges*, xviii. 208.
See PRACTICE, 23.

II. DEFECTIVE PROCESS.

11. A writ made returnable on a day before the day of the commencement of the term of court, is void, and an appearance and pleading does not cure the defect. *Holliday v. Cooper*, iii. 286. See SUPRA, 4.

III. JUSTIFICATION UNDER PROCESS.

12. Where the Justice has jurisdiction of the person and subject matter of the complaint, his process, though defective, will justify the officer executing it. *Miller v. Brown*, iii. 127. *Hickman v. Griffin*, vi. 37.

13. And this principle applies to an execution which is defective in form. *Davis v. Wood*, vii. 162.

14. The return of an officer, showing that he had acted under the directions of the plaintiff, is evidence in his favor. *The State v. Steel*, xi. 553.

IV. EVIDENCE.

15. The return of a constable is only *prima facie* evidence of the facts therein stated. *Perryman v. The State*, viii. 208.

V. SERVICE AND RETURN.

a. PERSONAL SERVICE.

16. Under the statute requiring the sheriff to "read the writ, declaration, petition or statement to the defendant," (1 Ter. L. 114, § 22,) the reading of the writ alone is not a sufficient service. The disjunctive "or" applies to the "declaration, petition or statement" only; and the reading of the writ and declaration, petition or statement, is necessary to constitute a good service. *Hickman v. Barnes*, i. 156.

17. Personal service of a writ and petition, under the practice act of 1849, (Acts 1848-9, 78, § 4,) may be made either by reading both to the defendant, or delivering a copy of both to him; but service by reading the writ and delivering a copy of the petition is not good. *Waddingham v. City of St. Louis*, xiv. 190.

b. BY COPY.

18. Where a notice is served by leaving a copy, the officer's return must show that the copy was left with a white person of the party's family. (See R. S. 1825, 623, §§ 5, 34.) *Dobbins v. Thompson*, iv. 118.

19. Parol evidence is admissible to show that the person with whom a copy was left, in such a case, was a member of the party's family. *Ibid.*

20. The term "family," as used in the statute relating to the service of process, is not confined to persons under the control or in the employment of the defendant. Thus, if a son takes his widowed mother to reside with him, she is a member of his family within the meaning of the statute. *Ellington v. Moore*, xvii. 424.

See PRACTICE, 92.

C. BY WHOM SERVICE SHOULD BE MADE.

21. A writ served by a deputy sheriff, in his own name, is bad, and a writ of error will lie thereon. *Harriman v. The State*, i. 504.

d. DEFECTIVE SERVICE CURED BY APPEARANCE.

22. Where a party appears and pleads to the merits, it cures all defects in or want of service. *Griffin v. Samuel*, vi. 50.

23. Although it may not appear from the proceedings in a cause that process has been served on a party, yet if he appear by attorney and file a plea, he will be considered as having personal notice. *McNair v. Biddle*, viii. 257.

See PRACTICE, 4, 8.

e. RETURN.

aa. *Form and Requisites.*

24. A return upon a writ in these words, "the within lawfully executed," is bad. The officer should return how he served the process. *Charless v. Marney*, i. 537.

25. A return of the service of a petition and summons in these words, "served the within writ of petition and summons on A. J. by giving a true copy of the same to him in Caledonia, Bellevue township," is sufficient; the words "writ of" being rejected, and it being presumed that Caledonia and Bellevue township are in the sheriff's county. *Jones v. Relfe*, iii. 388.

26. The return of a constable is defective where it is not signed officially and does not show in whose presence the summons was read; but the defect is waived by an appearance and going into a trial without raising the objection. *Spencer v. Medder*, v. 458.

27. The service and return of process by a deputy should be in the name of his principal, but any defect therein is waived by an appearance and trial upon the merits. *Atwood v. Reyburn*, v. 533.

28. The indorsement on the writ by the sheriff, showing the manner in which it was executed, and the filing of the same in the clerk's office, constitute in law the return. *The State v. Melton*, viii. 417.

29. The failure of a constable to specify in his return, that the writ was served in his township, will not vitiate the subsequent proceedings, so that they may be avoided in a collateral suit. *Crowley v. Wallace*, xii. 143.

30. A return of service of process which certifies service "by delivering a

copy to the wife of the said A. B., over sixteen years of age, on this," &c., is defective in that it does not appear that the copy was delivered "at the usual place of abode" of the defendant. *Smith v. Rollins*, xxv. 408.

bb. *Construction of.*

31. A sheriff's return should be construed strictly, and where it stated the service to be "by going to the defendant's house and leaving a true and attested copy of the summons with L. H., a white person of the defendant's family," it was held that it did not sufficiently appear that the copy was left at the defendant's "dwelling house or place of abode." (R. S. 1825, 623, § 5.) *Blanton v. Jamison*, iii. 52.

cc. *Validity.*

32. A sheriff's return, regular on its face, is conclusive upon the parties to the suit; its truth can be controverted only in an action against the sheriff for a false return. *Hallowell v. Page*, xxiv. 590. *Page v. Page*, xxiv. 595. *Delinger v. Higgins*, xxvi. 180.

dd. *Defective Return.*

33. The fact that the return of service of process is defective, is no ground for dismissing a suit. *Phillebart v. Evans*, xxv. 323.

34. After a defendant has appeared and obtained time to answer, and has answered, it is too late to object to the sufficiency of the return of service of process. The objection to the return should be the first step taken by the defendant in a cause. *Delinger v. Higgins*, xxvi. 180. See ERROR, 12;... PRACTICE, 5;... SHERIFF, 8.

See AMENDMENT, II;... ATTACHMENT, VI;... BOATS AND VESSELS, VII;
.... ERROR, 34;... EXECUTION, XV;... GARNISHMENT, II;....

* JUSTICE OF THE PEACE, 21-27;... PARTITION, 14-16.

PUBLIC LANDS.

- I. SURVEY.
- II. ENTRY.
- III. PATENT.
- IV. PRE-EMPTION.
- V. CONFLICTING CLAIMS.
- VI. RESERVATIONS.
- VII. SWAMP LANDS.
- VIII. EMBLEMENTS.

IX. GOVERNMENT OFFICERS AND AGENTS.

- a. GENERALLY.
- b. SURVEYOR GENERAL.
- c. REGISTER.

X. CONFIRMATIONS AND GOVERNMENT GRANTS.

- a. VALIDITY AND EFFECT.
- b. EVIDENCE.
- c. BOUNDARY, SURVEY, LOCATION AND DESCRIPTION.
 - aa. Generally.
 - bb. Evidence.
- d. OUT-LOTS AND COMMON FIELD LOTS.
- e. ENUREMENT.
- f. ABANDONMENT.
- g. SCHOOL LANDS.
- h. CONFLICTING CLAIMS.
- i. ST. CHARLES COMMON.
- j. CARONDELET COMMON.
- k. ST. LOUIS COMMON.
- l. LIMITATION.

XI. SPANISH GRANTS.

XII. NEW MADRID CERTIFICATES.

- a. VALIDITY.
- b. LOCATION.
- c. EVIDENCE.
- d. LIMITATION.
- e. ENUREMENT.

I. SURVEY.

1. By the Act of Congress of February 11, 1805, (2 U. S. Stat. 313, § 2,) public lands purchased of the United States are bounded by the lines actually run and designated in the surveys thereof by the agents of the government, and are taken to contain the exact quantity expressed (whether in fact more or less) in the return of the Surveyor General. The act in this respect adopts the common law rule, that where land is conveyed by metes and bounds, the purchaser is limited to the boundaries stated in his deed. *Campbell v. Clark*, vi. 219. *Same case*, viii. 553.

2. Boundaries may be proved by a witness who is acquainted with the lines and corners run and established by the Surveyor, though he never saw the land surveyed. It is not necessary to produce any plat of survey or field notes. *Weaver v. Robinett*, xvii. 459.

3. A survey made by an officer authorized by law, is *prima facie* evidence, and cannot be questioned by a mere trespasser. *Trotter v. St. Louis Public Schools*, ix. 68.

4. Where two surveys conflict, the proper locality must be determined by the history of both claims. If it appears that the two titles, when properly located, cover the whole or part of the same land, the right must be determined, as a question of law, in favor of the superior title. If the titles are of the same age

and description, and there is no evidence to impeach the survey of either, the party in possession cannot be disturbed. *McGill v. Somers*, xv. 80.

5. A survey which has not been duly approved and recorded in accordance with the practice in the office of the Surveyor General, is not admissible in evidence. *Gamache v. Piquignot*, xvii. 310.

See EVIDENCE, 1 ; . . . INFRA, 92-108 ; . . . WITNESS, 1.

II. ENTRY.

6. An application to a Register, and a deposit of money with him, in the absence of the Receiver, can give no right, in law or equity, to the land applied for. *Groom v. Hill*, ix. 320.

7. The receipt of a Receiver is *prima facie* evidence that the law has been complied with, but it does not stand on the same footing with a patent, and it may be shown by parol evidence to be void. *Allison v. Hunter*, ix. 741.

See EJECTMENT, 7, 16, 48 ; . . . INFRA, 31-33, 38 ; . . . PRACTICE, 128.

III. PATENT.

8. Although a patent may be void because it was not issued by authority of law, or by an officer duly authorized, yet such patent cannot be impeached by one resting on a naked possession. *Sarpy v. Papin*, vii. 503.

9. Where a patent is issued by an authorized officer, the law presumes that all the prerequisites necessary to its issue were complied with, and irregularities in the conduct of the officer can be inquired into only upon direct proceedings on the part of the government. *Allison v. Hunter*, ix. 741. *Barry v. Gamble*, viii. 88.

10. If two patents be issued by the United States for the same land, and the first in date be obtained fraudulently or against law, it does not carry the legal title. *Wright v. Rutgers*, xiv. 585. [See *Stoddard v. Chambers*, 2 How. U. S., 284.]

11. A patent issued for lands reserved from sale is void. *Ibid.* [*Stoddard v. Chambers*, 2 How. U. S., 284.]

12. The fee of land sold by the United States remains in the government until transferred by patent, which is a better legal title than a prior entry. *Carman v. Johnson*, xx. 108.

13. A patent issued to a fictitious person is a nullity. *Thomas v. Wyatt*, xxv. 24. *Thomas v. Boerner*, xxv. 27.

14. An exemplification of a patent certified by the Commissioner of the General Land Office, may be received in evidence without proof of the loss of the original. *Barton v. Murrain*, xxvii. 235.

See EJECTMENT, 16, 28 ; . . . INFRA, 34, 39-42, 147, 156, 157.

IV. PRE-EMPTION.

15. The decision of the Register and Receiver granting a pre-emption is conclusive only against the government, that a right of pre-emption exists, in consequence of a certain improvement; it is not conclusive between individuals contesting the right to the land. *Bird v. Ward*, i. 398.

16. A bill, setting forth that A. made improvements on a tract of land, and sold the same to B., who sold to C.; and that afterwards A. fraudulently obtained a certificate for the pre-emption right, contains equity, and a general demurrer will not lie to it. The equitable right in such case is in C., and a court of equity will compel A. to give up that which he has fraudulently obtained. *Ibid.*

17. To entitle a person to a right of pre-emption, under the act of Congress, (3 U. S. Stat., 121,) he must be either the head of a family or twenty-one years of age. *Ely v. Ellington*, vii. 302.

18. The acts of Congress which authorize the Register and Receiver to decide upon pre-emption rights, (5 U. S. Stat., 251, 382,) make their decision final, until reversed by the Commissioner of the General Land Office or the President. *Lewis v. Lewis*, ix. 182.

19. And a State court will not interfere to set aside their decision, unless it be affected with fraud or coupled with a trust. *Ibid.*

20. But a State court will protect the rights of a pre-emptor against one claiming under a certificate merely, upon which a patent has not issued. *Ibid.*

21. A lease of land to which the lessor has only a right of pre-emption, is void. *Bower v. Higbee*, ix. 256.

22. Where A. was entitled to a pre-emption right to certain lands, it could not be entered at private sale by B.; and A., having applied to prove his pre-emption right, and being prevented by the officer under the impression that the land was not subject to pre-emption, an entry of the land by B., while subject to the pre-emption of A., is void, although the pre-emption right was not proved up before the expiration of the law granting such right. *NAPTON, J., dis. Allison v. Hunter*, ix. 741.

23. The pre-emption law of July 9, 1832, (4 U. S. Stat. 565,) was not continued in force by that of 1838, (5 U. S. Stat. 251,) and a pre-emption certificate issued in 1839, and which purported to be under the act of 1832, is void upon its face. *O'Hanlon v. Perry*, ix. 794.

24. But it is otherwise where it appears that the delay in the issue of the certificate was solely in consequence of the neglect of the officers of the government, and not by reason of any fault in the pre-emptor. *Same case*, xi. 586.

25. The act of the Commissioner of the General Land Office, in cancelling such entry when such action is not in pursuance of the laws of the United States, does not render such entry void and ineffectual. The propriety and legality of the action of the Commissioner in this respect is subject to examination by the courts of this State, where the title to the lands entered is in question between citizens of this State. *Ibid.*

26. A pre-emption right under the act of Congress of June 1, 1840, (5 U. S. Stat. 382,) cannot be transferred. *Paulding v. Grimsley*, x. 210.

27. By the act of Congress of July 9, 1832, (4 U. S. Stat. 565,) claimants whose claims had been rejected could obtain a pre-emption only by being actual settlers and housekeepers. But claimants whose claims had not been rejected, could, by a relinquishment of their claim to the United States before a decision, acquire a pre-emption, and the certificate of the recorder of such relinquishment is the evidence of the right to such pre-emption. In the latter case, no settlement was necessary. *Perry v. O'Hanlon*, xi. 585.

28. And all land to which claims were presented was reserved from sale until some disposition of such claim could be made. And where claims were presented to land, and the claim relinquished to the United States before any decision upon them, the reservation still continues. And a patent to such land is void if granted to any other than the claimant who takes under the relinquishment. *Ibid.*

29. A person having settled upon one quarter section of land and cultivated another, being entitled to elect on which he will prove his right of pre-emption, cannot prove his right to enter one quarter upon condition that such entry should be cancelled in the event that his right of pre-emption to the other quarter should be established by the decision of the Commissioner of the General Land Office, the register and receiver not having the authority to permit a party to vacate his entry. *McDaniel v. Orton*, xii. 12.

30. Where a party obtains a pre-emption certificate for a tract of land from the State Land Officers by fraudulent practices upon the rights of another, a court of equity has jurisdiction to compel a transfer of the certificate thus obtained to the person defrauded. *Huntsucker v. Clark*, xii. 333.

See EJECTMENT, 26, 43; . . . INFRA, 38; . . . REPLEVIN, 8.

V. CONFLICTING CLAIMS.

31. Ejectment by the holder of a land certificate against one who held a patent for the same land issued on a younger certificate—*Held*, that the elder certificate must prevail against the younger, and that the Commissioner of the Land Office had no authority under the act of Congress of May, 1824, (4 U. S. Stat. 31,) to vacate it. *Morton v. Blankenship*, v. 346.

32. Where two certificates of entry are issued, and no patent is taken on either, the eldest will hold the land, there being no evidence of fraud, illegality or irregularity in the entry. *Groom v. Hill*, ix. 320.

33. And the fact that the Commissioner of the General Land Office had cancelled the first entry, no patent being issued on the second, will not affect the right of the party claiming under the eldest entry. *Ibid.*

34. The plaintiff in ejectment claimed the land in dispute under a patent from the United States, dated June 15, 1826, and the defendant claimed under the act of Congress of July 4, 1836, (5 U. S. Stat. 126,)—*Held*, that the plaintiff's was the better title, and that the patent of 1826, whether valid or not, must pre-

vail against the confirmation by the act of 1836, since the latter act expressly excepts from its operation all lands previously located by any person, under any law of Congress. *Sarpy v. Papin*, vii. 503. *Waller v. Von Phul*, xiv. 84. [See *Menard v. Massey*, 8 How. 293.]

35. Where one enters land of the United States in his own name with the money of another, and procures a patent for the same, equity will decree the title to the party to whom it belongs. TOMPKINS, J., *dis.* *Stephenson v. Smith*, vii. 610.

36. And the State courts have jurisdiction in such a case, and a decree compelling the fraudulent patentee to convey to the equitable owner, does not violate the compact between this State and the United States, by which the State bound itself not to pass any law interfering with the primary disposal of the soil of the United States, or with any regulations of Congress for securing the title to such soil to the *bona fide* purchaser. TOMPKINS, J., *dis.* *Ibid.*

37. Where a survey is made by the officers of the United States, and it is a matter of concern between the government and the grantee only, the State courts will not interfere. But where the title has passed from the government, and the rights of others are involved, those rights will be protected by the State courts. *Ott v. Souldard*, ix. 573.

38. A certificate of pre-emption issued on the 1st June, 1840, under a right acquired under the pre-emption law of June 22nd, 1838, (5 U. S. Stat. 251,) will prevail against a certificate of entry made April 10th, 1839. The entry was subject to the condition that there was no pre-emption right to the land; and the pre-emption certificate relates back to June 22nd, 1838, and is thus the older right. *Pettigrew v. Shirley*, ix. 675.

39. Where certain lands are claimed by one party under a patent from the United States, and by the other as a grantee of the United States, by an act of Congress, and it appeared that the survey on which the patent was founded was returned to the recorder's office February 12th, 1822, and that the grantee accepted the grant from the United States December 31st, 1821, it was *held*, that the title was vested in the grantee, instead of the patentee. *Lessieur v. Price*, xii. 14.

40. The patentee in this case was proprietor of lands in New Madrid, which were injured by the earthquakes, and he became thereby entitled to the bounty of Congress. Strangers to him procured this bounty in his name, and he did not ratify the same until he did it by deed in 1842—*Held*, that as this bounty was conditional on the donee's giving up the injured land, that the title did not vest in the patentee until he had accepted the gift of Congress by deeding it away. *Ibid.*

41. The plaintiff derived title to the premises in dispute from a Spanish grant which was confirmed by the act of Congress of July 4, 1836, (5 U. S. Stat. 126,) and the defendant claimed under a patent from this State, founded upon a sale of saline lands granted to the State by the act of Congress of March 6, 1820, (R. S. 1845, 17.)—*Held*, that the latter was the better title, and would prevail over the Spanish claim. *Delauriere v. Emmerson*, xiv. 37.

42. A suit was brought under the act of Congress of May 26, 1824, (4 U. S.

Stat., 52,) to try the validity of a claim to land—*Held*, that the land was not reserved from entry and sale during the pendency of the suit, unless the claimant had filed a notice of his claim with the recorder of land titles prior to July 1, 1808, and that a person obtaining a patent for the land from the United States, after the institution of the suit, but before a final decree in favor of the claimant, would hold it against a patent issued upon the decree in favor of the claimant. *McCabe v. Worthington*, xvi. 514.

43. Although the State courts cannot interfere with the primary disposition of the soil by the general government, yet if, in obtaining from the United States the legal title to a tract of land, one be guilty of a fraud, or affects himself with a trust, he shall hold the title thus acquired for the benefit of those who have been injured by his conduct. *Groves v. Fulsome*, xvi. 543.

44. A., having entered a tract of land, found B., a married woman, in possession, without the right of pre-emption, and paid her fifty dollars for her improvements and for yielding possession to him. Afterwards, without notice to A., and with the money thus obtained, she procured a patent for the same, under color of a right of pre-emption—*Held*, that the right thus acquired was clothed with a trust for the benefit of A. *Ibid*.

45. Where the legislature gave the trustees of a town authority to convey certain vacant lots, it was *held*, that under such authority the trustees had a right to convey, and the title given by them could not be disputed by one claiming of the town by a subsequent title. The fact that there was a squatter upon the lots would not prevent them from being considered as vacant. *Tigh v. Chouquette*, xxi. 233. See *INFRA*, 146–158.

VI. RESERVATIONS.

46. Where land has been reserved from sale by the United States, and the register and receiver sell them, notwithstanding the reservation, their acts are void as to the United States. *Quære*, whether they would be so as to a party resting upon a naked possession. *Hunter v. Hemphill*, vi. 106.

47. But the mere designation of a claim to land upon the books of the register of the Land Office, by a stranger, is not a sufficient compliance with the act of Congress of March 3, 1811, (2 U. S. Stat. 665, § 10,) to authorize the register to reserve such land from sale. *Ibid*.

See *SUPRA*, 42; . . . *INFRA*, 51, 183–186.

VII. SWAMP LANDS.

48. The trust created by the act of Congress of September 28, 1850, (9 U. S. Stat. 519,) granting swamp lands to the State of Missouri, is a personal trust reposed in the public faith of the State, and not a property trust fastened, by the terms of the grant, upon the land itself, and following it into whose hands soever it may pass. *Dunklin County v. Dunklin County Court*, xxiii. 449.

VIII. EMBLEMENTS.

49. A party who plants on public lands is not entitled to the growing crop as emblements. They pass with the title to the land to the purchaser from the United States. *Boyer v. Williams*, v. 335.

IX. GOVERNMENT OFFICERS AND AGENTS.

a. GENERALLY.

50. Whatever irregularities may be committed by the agents of the government in the sale of the public lands, their acts are valid *prima facie*, until disclaimed by the United States. *Hunter v. Hemphill*, vi. 106.

51. Therefore, where there was no express reservation, and the agents had a general authority to sell, a sale by them is valid and binding upon all parties, except the United States, and those claiming under the United States. *Ibid.*

b. SURVEYOR GENERAL.

52. Where a ministerial officer is required to exercise his judgment, or does a judicial act which is within his jurisdiction, then, although an injury may arise to another, such officer is not liable to a civil action by the injured party, unless it be shown that the act was wilful and malicious. Thus, a surveyor general is not liable to an action for revoking the commission of a deputy, and annulling a surveying contract and refusing to receive and examine the field notes, where he acts in good faith and without malice. *Reed v. Conway*, xx. 22. See *INFRA*, 55.

53. Since the only duties of a deputy surveyor are to make surveys under special contracts, his removal, where he has no such contract, although wanton and without cause, would give him no cause of action. And where the surveyor general, in interfering with the deputy in the execution of his contract, acts in good faith and without malice, the fact that he acts unlawfully will not subject him to liability. *Reed v. Conway*, xxvi. 13.

54. A contract entered into in behalf of the United States, by the surveyor general of Illinois and Missouri, with one of his deputies, for surveying of public lands, is a contract of the government and not of the surveyor. *Ibid.*

55. Under the Act of Congress, (1 U. S. Stat. 464,) the surveyor general of Illinois and Missouri has no authority to remove one of his deputies, except for negligence or misconduct in office. After the surveyor general has entered into a surveying contract with a deputy he has no right, without cause, to remove him. *Ibid.* See *SUPRA*, 52.

c. REGISTER.

56. The register of the land office cannot delegate his judicial authority, but he may act by deputy as to ministerial duties. *Hunter v. Hemphill*, vi. 106.

X. CONFIRMATIONS AND GOVERNMENT GRANTS.

a. VALIDITY AND EFFECT.

57. The object of the act of Congress of 1812, relating to confirmations, (2 U. S. Stat. 748,) was to confirm to the inhabitants of the towns and villages therein enumerated, the lots occupied by them prior to December 1803, and did not apply to a person who had ceased to be an inhabitant long before December 1803, by abandoning the country, and who never after returned. *Lajoie v. Primm*, iii. 529.

58. That act passed the title of the United States to the person in possession of the lots therein enumerated prior to December 20, 1803, although such possession, &c., may not have continued up to the date of the act. *Gurno v. Janis*, vi. 330.

59. And it also, *proprio vigore*, conferred title on the claimants, and no further action was necessary, either on the part of the government or the claimant. *Page v. Scheibel*, xi. 167.

60. It was not necessary that the claimant should file a claim with any officer of the Federal Government; nor were the provisions of the act of 1824, (4 U. S. Stat. 52,) obligatory upon the claimants. The latter act only enabled them to procure documentary evidence of title *Ibid*.

61. So where a claimant does not prove his claim under the act of May 26, 1824, (4 U. S. Stat. 52,) his claim is not invalidated by want of such proof; but it is allowable for him to establish it by parol proof of inhabitation, cultivation, or possession prior to December 20, 1803. *Soulard v. Clark*, xix. 570. *City of St. Louis v. Toney*, xxi. 243. *City of Carondelet v. City of St. Louis*, xxv. 448.

62. And such persons, where their rights are in litigation, have only to show that their claims are embraced within the act. *TOMPKINS, J, dis.* *NAPTON, J., absent.* *Gurno v. Janis*, vi. 330.

63. And it is not necessary to show a concession, or any authoritative act of the Spanish Government, to show title to a common field lot, the act of Congress confirming the title upon possession, cultivation or inhabitation before 1803, without regard to the legality of the origin of the title. *Page v. Scheibel*, xi. 167.

64. And the cultivation of part of a tract of land, under claim of the whole, is a cultivation of the whole tract. *Gamache v. Piquignot*, xvii. 310.

65. But such inhabitation, cultivation and possession must have been actual inhabitation, &c. *Papin v. Hines*, xxiii. 274.

66. The recorder had no power, under the act of 1812, to confirm any title on a concession; he was authorized to act alone upon inhabitation, cultivation or possession. *Page v. Scheibel*, xi. 167.

67. The treaty by which Louisiana was acquired, imposed only a political obligation upon the government of the United States to perfect titles, rights and claims originating under France and Spain. *Mackay v. Dillon*, vii. 7.

68. And when the government confirms land to one claimant, it extinguishes any mere inchoate title in another. *Ibid*.

69. The act of Congress of July 4, 1836, (5 U. S. Stat. 126,) is a legislative

grant of the interest of the United States, in the confirmed claims to the confirmees, and requires no further action to pass the title of the United States to them. A patent issued under that act is without authority and void. *Ashley v. Cramer*, vii. 98.

70. This act does not require that a claim should in terms be recommended for confirmation, in order that it may come within the purview of the act. The opinion of the board of commissioners, that a claim was confirmed by the act of June 13, 1812, is sufficient. *Soulard v. Clark*, xix. 570.

71. The effect of a confirmation, under the acts of Congress, of a claim to lands, is only the relinquishment of title on the part of the United States, and does not affect the right or title of adverse claimants to the same land. *Barry v. Gamble*, viii. 88.

72. A confirmation of land by law is equivalent to a patent, and after such confirmation, the United States cannot divest the title by giving a patent to another. *Harrold v. Simonds*, ix. 323. *Cottle v. Sydnor*, x. 763.

73. Where a Spanish grant has been reported upon by the commissioners acting under the acts of Congress of July 9, 1832, (4 U. S. Stat. 565,) and of March 2, 1833, (4 U. S. Stat. 661,) and confirmed by the act of Congress of July 4, 1836, (5 U. S. Stat. 126,) the courts of this State cannot question the validity of such confirmation, upon the ground that no survey had been previously made under the Spanish Government. *Archer v. Bacon*, xii. 149.

74. The effect of a confirmation by the board of commissioners for the adjustment of land titles in the territory of Louisiana, under the act of Congress of March 3, 1807, (2 U. S. Stat. 440,) is to vest the legal title in the claimant or his legal representatives. *Landes v. Perkins*, xii. 238.

75. But the act directs the board of commissioners to confirm only such claims as may be brought within its provisions, by evidence produced before them, and does not import a present confirmation by the direct action of Congress upon the claim, and until an inchoate title, originating under the Spanish Government, has been confirmed, it has no standing in a court of law or equity. *Burgess v. Gray*, xv. 220.

76. The act of Congress of April 12th, 1814, (3 U. S. Stat. 121,) does not, *proprio vigore*, confer a legal title. *Papin v. Hines*, xxiii. 274.

77. The commissioners appointed under the act of Congress of July 9, 1832, (4 U. S. Stat. 565,) were authorized to examine only those unconfirmed claims that had been previously filed in the office of the recorder of land titles; no new claims could be examined by them. After the passage of that act, claims undisposed of after May 26, 1828, stood as they did before the passage of the act of May 26, 1824, (4 U. S. Stat. 52.) *Papin v. Massey*, xxvii. 445.

See EJECTMENT, 6, 14.

b. EVIDENCE.

78. Under the statute, (R. S. 1825, 362, § 5,) which provided that "certified copies of confirmations had before the board of commissioners for the adjustment, &c., or before the recorder of land titles," &c., shall be received as evidence—*Held*, that a certified copy of a portion of a report made to the Commissioner

of the General Land Office, by the recorder of land titles, under the act of Congress of August 2d, 1813, (3 U. S. Stat. 86,) which report showed that a particular claim was reported to said commissioner, with the opinion of the recorder that it ought to be confirmed, was admissible in evidence to show that said claim was embraced among those afterwards confirmed by Congress. *George v. Murphy*, i. 777.

79. The certificate of the recorder, made in conformity with the act of Congress of May 26, 1824, (4 U. S. Stat. 66, § 3,) is evidence of the facts therein stated. Where the law requires an officer to certify facts, his certificate is evidence in regard to the facts required to be certified. *Gurno v. Janis*, vi. 330. *Cerre v. Hook*, vi. 474.

80. And such certificate is only *prima facie* evidence of a confirmation under the act of 13th June, 1812, (2 U. S. Stat. 748,) and the description list sent to the surveyor's office by authority of the latter act, is evidence of as high a character as the certificate would be, and a properly authenticated extract from it is entitled to all the effect that the original certificate would have. *McGill v. Somers*, xv. 80. *Joyal v. Rippey*, xix. 660.

81. The *prima facie* effect of such certificate may be rebutted by other evidence. *Montgomery v. Landusky*, ix. 705.

82. And although a certificate of confirmation granted by the Recorder, under the act of Congress of May 26, 1824, (4 U. S. Stat. 65,) is *prima facie* evidence of title under the act of June 13, 1812, (2 U. S. Stat. 748,) as against the government and persons claiming by title subsequent to that act, it is not sufficient to establish title to land lying within the approved United States survey of St. Louis Common as against one claiming title under the city of St. Louis; there must, in such case, be actual proof of inhabitation, cultivation and possession prior to December 20, 1803. *Vasquez v. Ewing*, xxiv. 31.

83. And the approved United States survey of the Common of St. Louis, is not conclusive as against the inhabitants of the adjacent town of Carondelet. It may be shown in behalf of the latter, that land embraced within said survey was used and possessed prior to December 20, 1803, as Common of Carondelet; and that, too, although it is not embraced within the United States survey of the Common of Carondelet. *City of Carondelet v. City of St Louis*, xxv. 448.

84. The plaintiff to bring his claim within the act of Congress of July, 4, 1836, (5 U. S. Stat. 126,) confirming the proceedings of the commissioners, offered in evidence, extracts from the minutes of the board, containing their proceedings on this claim in 1833—*Held*, that as this evidence did not show under what power the commissioners acted, or whether this was one of the decisions reported to the general land office, it was too indefinite to make a *prima facie* case. *Ashley v. Cramer*, vii. 98.

85. The tabular statement of the books of the Recorder of land titles, showing the confirmation of a lot, its size, &c., are admissible as evidence. *Biehler v. Coonce*, ix. 343.

86. The certificate of the Surveyor General that a certain lot of land is embraced within the limits of a tract confirmed by the Board of Public Schools, under the act of 1824, (4 U. S. Stat. 65,) is not evidence. *Evans v. Labaddie*, x. 425.

87. It is the settled course of decision in this State, that one who claims land under the act of Congress of 1812, (2 U. S. Stat. 748,) did not lose his land by a failure to prove up his claim before the Recorder of Land Titles, under the act of May, 26, 1824, (4 U. S. Stat. 65,) but may establish his claim in the courts of the country, by proof of cultivation and possession prior to Dec. 20, 1803. But if the Recorder who took the proof under the act of 1824, failed to issue a certificate of confirmation, or to include the claim in his list furnished to the Surveyor General, neither a certificate of confirmation, nor any other documents issued by his successor in office, many years afterwards, upon an inspection of the proof taken before him, is any evidence of title; certainly not, when the acts of the Recorder issuing the documents are not recognized by the United States government. *Gamache v. Piquignot*, xvii. 310.

88. The affidavits which were taken before Recorder Hunt, under the act of 1824, (4 U. S. Stat. 65,) are not competent evidence to establish the facts therein testified to. *Ibid*.

89. A certificate of confirmation issued by Recorder Conway in 1834, of a claim included in Hunt's list of confirmations, under the act of 1824, is *prima facie* evidence of all the facts necessary to a confirmation by the act of 1812. *Soulard v. Allen*, xviii. 590.

90. Hunt's minutes of testimony, taken under the act of Congress of 1824, (4 U. S. Stat. 65,) are not admissible in evidence, except to prove such facts as can be proved by hearsay; where, however, one party introduces them in evidence, the opposing party may have the full benefit of them. *Clark v. Hammerle*, xxvii. 55.

91. As the Recorder of Land Titles was not authorized by the act of Congress of May, 26, 1824, (4 U. S. Stat. 65,) to take proof in relation to the extent and boundaries of commons confirmed to a village by the act of 1812, a certificate of common issued by him would not be evidence of title thereto. *Primm v. Haren*, xxvii. 205.

See EJECTMENT, 27, 29, 30; . . . INFRA, 114; . . . PRACTICE, 136-139.

C. BOUNDARY, SURVEY, LOCATION AND DESCRIPTION.

aa. Generally.

92. A defective description in a confirmation of a tract of land, must be supplied in the same way that defective descriptions are supplied in other instruments. *Strother v. Christy*, ii. 148.

93. The confirmation of a claim of six thousand arpents of land will not entitle the confirmee to hold a larger quantity, as included by the metes and bounds fixed by a subsequent survey, especially, if such survey interferes with the claim of another person, which has been confirmed. *NAPTON J., dis. Dent v. Bingham*, viii. 579.

94. Where a concession described the land as in Grand Prairie, and bounded by Little River, (Mill Creek) although the Recorder in his confirmation refers to Little River as the boundary, as in the concession—if it be shown that Grand Prairie did not, in fact, touch Little River, and that the lot was in Grand Prairie

Common Fields, the boundary of Little River must be rejected. *Page v. Scheibel*, xi. 167.

95. It is no impeachment of a survey, of a confirmation by the Recorder of Land Titles, under the act of 1824, (4 U. S. Stat. 52,) that it includes less than the quantity claimed before the Recorder. So, the mere fact that there is not enough land in a block to satisfy all the claims proved before the Recorder, does not show that a survey of one of the lots, including less than the quantity claimed, is erroneous, or that the surveys of the other lots, including the full quantity claimed, are erroneous. *Joyal v. Rippey*, xix. 660.

96. As to the power in the general land office to set aside an approved survey made prior to July 4, 1836, and within what time it must be exercised, if it exists. *City of Carondelet v. McPherson*, xx. 192.

97. It is a fatal objection to a claim of title, under the act of 1812, (2 U. S. Stat. 748,) that it does not appear from the report of the commissioners, that the concession contained a special location, or that it had been actually surveyed before March 10th, 1804, by a surveyor duly authorized by the government making the grant. *Papin v. Hines*, xxiii. 274.

98. The rights of claimants, whose claims were confirmed by the act of Congress of 1812, (2 U. S. Stat. 748,) are not confined to the spot actually inhabited or cultivated. *City of St. Louis v. Toney*, xxi. 243.

99. In the case of a confirmation, under the act of Congress of March 3, 1807, (2 U. S. Stat. 440,) where the confirmation is accompanied with the condition that the land confirmed shall be surveyed, such survey, when made by the proper executive officers of the United States, conclusively settles the question of the locality of the tract confirmed, and the courts, either of law or equity, cannot locate the tract elsewhere. *Magwire v. Tyler*, xxv. 484.

100. And where the legal representatives of the confirmer, appropriates the land as afterwards located and surveyed by the United States, and receives a patent therefor, a person claiming the same land under the confirmer as elsewhere located, by title acquired subsequent to the appropriation, cannot dispute the propriety of the location as actually made. *Ibid.*

bb. Evidence.

101. The plaintiff in ejectment claimed the land in dispute by settlement prior to Dec. 20, 1803, under the acts of Congress of March 2, 1805, (2 U. S. Stat. 324,) and June 13, 1812, (2 U. S. Stat. 748,) The defendant claimed, in like manner, under the same acts, and a confirmation by the act of Congress of April 29, 1816, (3 U. S. Stat. 328.) The plaintiff's claim was confirmed under the act of July 4, 1836, (5 U. S. Stat. 126.) Neither claim was confirmed by metes and bounds—*Held*, that it was competent for the plaintiff to show that the settlement of M., under whom the defendant claimed, was not within the lines of survey, consequent upon the plaintiff's confirmation, but was, in fact, two miles distant. *Moss v. Anderson*, vii. 337.

102. Where no plat, or a defective one of the survey of a grant is filed with the Recorder, the plat recorded in the books in the Surveyor General's office,

may be resorted to as auxiliary, but not as better evidence. *Ott v. Soulard*, ix. 573,

103. A survey made under the act of Congress of 29th April, 1816, (3 U. S. Stat. 325,) when examined and sanctioned as contemplated by law, is conclusive upon the government, and upon all persons who claim under titles subsequent to the survey, and is *prima facie* evidence of locality against all persons who claim under an opposing title. *McGill v. Somers*, xv. 80.

104. Where a map, which is referred to in a deed for the boundaries and location of the land confirmed, is lost, another map, which is proved to be one of three originals, is admissible in evidence. *Soulard v. Allen*, xviii. 590.

105. An official survey is *prima facie* evidence of the boundaries and location of the land confirmed. *Ibid.*

106. An official survey of a claim confirmed by the act of Congress of July 4, 1836, (5 U. S. Stat. 126,) may be used as evidence of the locality and extent of the same claim confirmed by the act of 1812, (2 U. S. Stat. 748.) *City of St. Louis v. Toney*, xxi. 243.

107. The opinion of a surveyor as to the proper location of a concession or grant, is inadmissible in evidence. *Blumenthal v. Roll*, xxiv. 113.

108. A certificate of confirmation issued in 1825, by Recorder Hunt, under the act of Congress of 1824, (4 U. S. Stat. 65,) in favor of Roy's representatives, for a lot in the Cul de Sac Common Field, described the lot confirmed, as bounded North by a field lot of A. Guion, and East by Auguste Chouteau's mill tract. On the margin of the claim of A. Guion, are these words, "in Chouteau's mill tract"—*Held*, that this marginal entry was not admissible in evidence, as against those claiming under Roy, to show that the lot confirmed to Roy was situate within Chouteau's mill tract. The Spanish survey of "Chouteau's mill tract," in which the land on the West of the survey is stated to be "vacante" is admissible in evidence, as bearing upon the question of the location of Roy's confirmation; the same weight should be attached to it as to reputation or hearsay in establishing ancient boundaries. *Clark v. Hammerle*, xxvii. 55.

See *INFRA*, 174, 182-186; . . . *PRACTICE*, 136-139.

d. OUT LOTS AND COMMON FIELD LOTS.

109. What constitutes a common field lot, within the meaning of the act of Congress of 1812 (2 U. S. Stat. 748,) defined, and declared to be a matter of law to be determined by the court. *Page v. Scheibel*, xi. 167.

110. As to the meaning of the term "out lot," and comments upon the opinion of the court in this respect in *Trotter v. St. Louis Public Schools*, ix. 68. *Eberle v. St. Louis Public Schools*, xi. 247. *City of St. Louis v. Toney*, xxi. 243.

111. A common field lot was one of a series of lots in the vicinity of a village, occupied and cultivated by the inhabitants of the village in a common field. *Per GAMBLE, J. Harrison v. Page*, xvi. 182.

112. To establish that a lot was a common field lot, within the meaning of the act of 1812, (2 U. S. Stat. 748,) it is not necessary to show that the village authorities under the Spanish government exercised any authority over it or its owner. *Ibid.*

113. That a lot was not embraced within a Spanish survey of the common fields, is slight, if any evidence, that it was not a common field lot. *Per GAMBLE, J. Ibid.*

e. ENUREMENT.

114. A confirmation under the act of Congress of April 29, 1816, (3 U. S. Stat. 328,) of a claim recommended for confirmation by the recorder of land titles, enures to the benefit of the confirmer, and a certified copy of the opinion of the recorder of land titles, recommending the claim to Congress for confirmation to the extent of a league square, is evidence that the claim is embraced within the act of April 29, 1816, as all the claims recommended by the recorder for confirmation were confirmed by that act. *Roussin v. Parks*, viii. 528.

115. A certificate issued to the legal representatives of A., when he had, before the certificate was issued, sold the lot to B., will not enure to the benefit of the heirs of A. *Montgomery v. Landusky*, ix. 705.

116. A decision of the board of commissioners confirmed by the act of Congress of July 4th, 1836, (5 U. S. Stat. 126,) in favor of the legal representatives of the original claimant, is a confirmation to an assignee, filing the claim before the recorder. *Boone v. Moore*, xiv. 420. [But see *Hogan v. Page*, xxii. 55.] *Mercier v. Letcher*, xxii. 66.

117. So a confirmation under that act to the original claimant and his legal representatives, enured by way of estoppel, to his assignee. *Wright v. Rutgers*, xiv. 585. [See *Stoddard v. Chambers*, 2 How. U. S., 284.]

118. And a confirmation under that act to a claimant or his legal representatives, will enure if he had assigned his interest previous to the confirmation, or was dead at the time, to his legal representatives—that is, to his heirs, or to the assignee of the whole or a part. If only a part had been assigned, the assignee and heirs would take as tenants in common. *Papin v. Massey*, xxvii. 445.

119. A., the owner of an unconfirmed Spanish grant for 30,000 arpents, entered into a bond with B., in the penal sum of \$20,000, conditioned for the conveyance by himself and his heirs, of 14,000 arpents of said grant, provided that said grant should be confirmed to A. or his representatives. The grant was afterwards confirmed to A. or his representatives—*Held*, that the confirmation enured to the benefit of B., as the legal representative of A., as to that portion (14-30) of the claim covered by the bond. *Ibid.*

120. Where there was a partition of a joint concession, each claimant would receive a confirmation for his separate interest; nor is there any principle which would prevent the act of Congress of 1812 from enuring in that manner. *Sou-lard v. Clark*, xix. 570.

121. A confirmation of a lot by the act of Congress of June 13th, 1812, (2 U. S. Stat., 748,) enures to the benefit of the last claimant, where there has been several successive transfers, whether before or after the change of government. *City of St Louis v. Toney*, xxi. 243.

122. A confirmation of a Spanish claim under the act of Congress of March 3rd, 1807, (2 U. S. Stat. 440,) is not rendered void from the fact that the person in whose name it was presented, and to whom it was confirmed, had previously

died; the confirmation will enure to the benefit of the legal representatives. *Berthold v. McDonald*, xxiv. 126.

f. ABANDONMENT.

123. Where the husband openly abandoned his family and left the country and never returned, the possession of his wife, after the abandonment, is not the possession of the husband. *Lajoie v. Primm*, iii. 529.

124. A confirmation by the act of June 13th, 1812, vested the title in the husband alone, as the head of the family, leaving the rights of the wife to be ascertained by the terms of the marriage contract, if any existed, or the laws regulating dower or community. *Byron v. Sarpy*, xviii. 455.

125. Where the husband abandoned his possession prior to June 13th, 1812, neither he nor his wife had any claim upon which the act could operate. The abandonment of the husband was the abandonment of the wife. *Ibid*.

126. The act of Congress of 1812, (2 U. S. Stat. 748,) was not intended to confer title on the original or first occupants who had abandoned their claims, but upon those who were last in possession prior to the passage of the act, and whose claims were subsisting at the time. *Page v. Scheibel*, xi. 167. *Barada v. Blumenthal*, xx. 162.

127. Removal from the village and ceasing to cultivate the lot, do not alone amount to an abandonment. To constitute an abandonment, there should be a removal with an intention to abandon, or some act amounting to a disclaimer of title. *Page v. Scheibel*, xi. 167.

128. The Spanish law of abandonment was in force in the Missouri territory until the adoption of the common law in the year 1816. Abandonment under that law is a question of fact, depending upon the intention of the party at the time of relinquishing the possession of his property. *Landes v. Perkins*, xii. 238.

129. It is well settled that no claim was confirmed by the act of 1812, which had been abandoned previous to the date of that act. *Byron v. Sarpy*, xviii. 455.

130. By an abandonment, is meant the quitting possession, with the intention that it should be no longer the property of the possessor. *Barada v. Blumenthal*, xx. 162.

131. The fact that a claimant of a lot of land in 1808, applied for and obtained the benefit of the act for the relief of insolvents, and that, in his inventory, he did not include the lot in question, coupled with the fact that he had previously removed from it the machinery of a mill which he had erected thereon, and the occupation of which was his only possession of the lot, was evidence of abandonment entitled to great weight. *Ibid*.

See RECORD, 26.

g. SCHOOL LANDS.

132. Section 2 of the act of June 13th, 1812, (2 U. S. Stat. 748,) which reserves vacant lots for the use of schools, does not pass the title to the property so reserved from the United States. *Hammond v. St Louis Public Schools*, viii. 65.

133. And under that section, the power to determine in favor of an individual, that he is the rightful claimant of the lot, and that it is not embraced in the reservation, is retained by the government. *Ibid.*

134. And the subsequent confirmation of a claim, by the act of April 29th, 1816, (3 U. S. Stat. 328,) takes the lot out of the reservation for the use of schools. *Ibid.*

135. The act of Congress of June 13th, 1812, (2 U. S. Stat. 748,) disposes of all lots, which had been inhabited, cultivated or possessed prior to December 20th, 1803, and was intended only to settle claims, rights or titles originating under the Spanish government. *Trotter v. St. Louis Public Schools*, ix. 68.

136. Section 2 was intended to make a donation, and is not confined to the lots mentioned in § 1, but reserves for schools all the land embraced in the out-boundary directed to be run in § 1, and not rightfully owned or claimed by private individuals, or held as commons belonging to some town or village, or reserved for military purposes. *TOMPKINS, J., dis. Ibid.*

137. Under § 2, neither occupancy nor possession prior to December 20th, 1803, is necessary to establish a town lot, or out-lot of a town. *Ibid.*

138. The survey of the out-boundary of the town of St. Louis, made, by the Surveyor General in 1840, in pursuance of the act of Congress of June 13th, 1812, (2 U. S. Stat. 748,) is *prima facie* evidence of title in the St. Louis public schools to the land within said boundary designated and set apart by him for the use of such schools. *Eberle v. St Louis Public Schools*, xi. 247.

139. But it is not conclusive, and may be rebutted by evidence, that a certain parcel of land embraced in such survey was neither "a town or village lot, out lot, common field lot, nor part of the commons belonging to such town," but was a vacant piece of ground not belonging to it. *Ibid.*

140. The reservation made by the act of 1812, (2 U. S. Stat. 748,) for the use of schools, includes only the lots in the sense in which they were understood in the enumerated towns and villages; and whether a certain piece of land is such a lot, is a mixed question of law and fact. *Ibid.*

141. The title of the State of Missouri to the 16th sections granted by the act of Congress of March 6th, 1820, for school purposes, (R. S. 1845, 20, § 6,) is not impaired or destroyed by the previous location of a New Madrid certificate upon these sections, since such sections were not subject to such locations. *Kennett v. Cole County Court*, xiii. 139.

142. A survey, designation and setting apart of lands to the public schools, by the Surveyor General, under the acts of Congress of June 13th, 1812, (2 U. S. Stat. 748,) and January 27th, 1831, (4 U. S. Stat. 435,) passes the entire title of the general government to the towns, for the support of schools. The production of the documents required by these statutes is sufficient to show that the title has passed from the government. And the entry of the same land with the register and receiver, must yield, in an action of ejectment, to the title under the designation. *SCORR, J., dis. Kissell v. St Louis Public Schools*, xvi. 553.

143. A title by such designation, and setting apart, cannot be impeached, except by showing it to be void. Irregularities in the action of the officers will not avail the claimant by adverse title. *SCORR, J., dis. Ibid.*

144. A designation and setting apart, which states that the land "is included within the bounds of the survey directed to be run by § 1 of the act of 1812," as well as within "the limits of the town of St. Louis, as it stood incorporated June 13th, 1812," is valid, though it does not state that the land set apart "is, or ever was, in whole or in part, a town lot, out lot, or common field lot, adjoining or belonging to said town," or that it was set apart as such. *Scott, J., dis. Ibid.*

145. A reservation from sale under the act of Congress of March 3rd, 1811, (2 U. S. Stat. 662,) of land claimed before the commissioners, was not such a disposition as would prevent the United States from afterwards passing a good title to the same, where designated as a sixteenth section, to the State for the use of schools, under the act of 1820, (3 U. S. Stat. 547, § 6.) The act of 1820, the subsequent assent of Missouri thereto, and the designation of a sixteenth section, vest in the State a complete title thereto for the use of schools, unless the title had previously passed out of the United States; and this title is superior to a subsequent confirmation by special act of Congress, of a Spanish claim, previously filed, but unconfirmed, especially when this subsequent confirmation only professes to be a relinquishment of any remaining title on the part of the United States. *The State v. Ham*, xix. 592.

See SUPRA, 86.

h. CONFLICTING CLAIMS.

146. The opinion or decision of a recorder of deeds as to the validity of a title to town lots under the act of Congress of June 13th, 1812, could be of no avail, as the courts of the country were alone authorized to decide between claimants under said act. *Vasseur v. Benton*, i. 296.

147. A confirmation of a claim to lands, in Missouri, cannot prevail over a prior patent from the United States. *Barry v. Gamble*, viii. 88.

148. A claim which was presented to the Recorder of Land Titles, was objected to as conflicting with the St. Louis commons. To obviate this objection, the claimant abandoned so much of his claim as was supposed to be subject to the objection, and took a confirmation to thirty arpents, in which it was stated "that only so much was abandoned as lies West of the line of the commons"—*Held*, that the confirmation embraced all the claim not included in the commons, and that the quantity of land was only matter of description. *Ott v. Soulard*, ix. 573.

149. A party having no title cannot question the correctness of the location of a confirmation made by a United States surveyor under the authority of an act of Congress. *Scott, J., dis. Boyce v. Papin*, xi. 16. *Archer v. Bacon*, xii. 149.

150. To bring a case within § 2 of the act of 1836, (5 U. S. Stat. 127,) so as to avoid a confirmation, the opposing location must be shown to have been made "under a law of the United States." *Wright v. Rutgers*, xiv. 585. [See *Stoddard v. Chambers*, 2 How. U. S. 284.]

151. A confirmation under the act of 1816, (3 U. S. Stat. 328,) when properly surveyed, is superior to a New Madrid location. *McGill v. Somers*, xv. 80.

152. A confirmation under § 1 of the act of Congress of 13th June, 1812,

(2 U. S. Stat. 748,) if of a common field lot, is superior to an opposing title, which stands alone upon a confirmation under the act of 29th April, 1816, (3 U. S. Stat. 328.) *Ibid.*

153. So a confirmation of a Spanish claim by the act of Congress of July 4, 1836, (5 U. S. Stat. 126,) will prevail over a New Madrid location and a patent dated May 28th, 1827, both made while the land located upon was reserved from sale, although the bar against that claim became complete May 26th, 1829, and remained so until July 9th, 1832, the date of the revival of the reservation from sale of the claims confirmed by the act of July 4th, 1836. *Easton v. Salisbury*, xxiii. 100. [See 8 How. 365.]

154. A confirmation with an official survey, under the act of Congress of 1836, is a better title than the confirmation of commons to the inhabitants of the town of Carondelet by the act of 1812, without an approved survey. *Inhabitants of Carondelet v. Dent*, xviii. 284.

155. The acts of Congress for the confirmation of Spanish titles in this State being in the nature of statutes of limitation, if a claim was not presented under them, the claimant cannot afterwards claim the benefit of a confirmation to another. If a party obtaining a confirmation by fraud thus affects himself with a trust, the party interested must state the circumstances as a ground of relief, and not simply bring ejectment. Where there are conflicting claims, a confirmation is held to pass title. *Guyol v. Chouteau*, xix. 546.

156. A confirmation by an act of Congress, with a patent, is a better legal title than a confirmation by the same act without a patent. *Maguire v. Vice*, xx. 429.

157. In a suit brought by A., claiming under the act of July 4th, 1836, (5 U. S. Stat. 126,) against B., claiming under a patent dated June 15th, 1826, it will be of no avail to A. to prove that the land sued for is embraced within the out-boundary line of the town of St. Louis. The patent will, in such a contest, prevail over the confirmation. *Papin v. Hines*, xxiii. 274.

158. Where there are two successive confirmations under the act of Congress of March 3rd, 1807, (2 U. S. Stat. 440,) of the same tract of land to different claimants, the superiority of either title must be determined by the relative merits of the two as they stood before the confirmations. *Berthold v. McDonald*, xxiv. 126.

See *INFRA*, 164; . . . *SUPRA*, V.

i. ST. CHARLES COMMON.

159. The claim of the inhabitants of the town of St. Charles to the commons adjoining that town, conceded by the Lieutenant Governor of Upper Louisiana in 1797 and 1801, and surveyed by the Surveyor General of that province in 1804, was confirmed by the act of Congress of June 13th, 1812, (2 U. S. Stat. 748.) *Bird v. Montgomery*, vi. 510. *Chouteau v. Eckert*, vii. 16.

160. And all proprietary right of the Spanish Government in the St. Charles commons passed to the United States, and was parted with by the United States, by the same act. *Ibid.* *Ibid.*

j. CARONDELET COMMON.

161. The title of Carondelet to the common, under the act of 1812, (2 U. S. Stat. 748,) may be established without a survey, by proof of user prior to December 20th, 1803. *City of Carondelet v. McPherson*, xx. 192. *City of Carondelet v. City of St. Louis*, xxv. 448.

162. As to the effect of the approval, by the Secretary of the Interior, of Brown's survey of Carondelet common. *Sigerson v. Hornsby*, xxiii. 268. *Funkhouser v. Hantz*, xxiii. 271.

163. A survey, by the United States, of the common confirmed to the village of Carondelet by the act of Congress of June 13th, 1812, (2 U. S. Stat. 748,) was not necessary to enable it to maintain an action for the possession of the same. *Funkhouser v. Langkopf*, xxvi. 453.

See ESTOPPEL, 17; . . INFRA, 170; . . LIMITATIONS, 15-16; . . SUPRA, 82, 83, 154.

k. ST. LOUIS COMMON.

164. The act of Congress of June 13th, 1812, (2 U. S. Stat. 748,) confirmed the claim of the inhabitants of St. Louis to the commons adjoining that town, and embraced the commons as described in the survey of 1806; and a party who claims under the inhabitants of St. Louis will prevail against a party who claims under a confirmation by the act of July 4th, 1836. (5 U. S. Stat. 126.) *Mackay v. Dillon*, vii. 7. *Swartz v. Page*, xiii. 603.

165. The survey of the out-boundary of St. Louis, under the act of 1812, though it professes to be based upon the corporate limits as they stood June 13th, 1812, is valid, if it is manifest therefrom that the town, as incorporated, must, according to its own limits, be within the out-boundary required to be run. *Scott, J., dis. Kissell v. St. Louis Public Schools*, xvi. 553.

166. And such a survey is not invalidated, in respect to land properly included within it, because it embraces too much or too little. *Scott, J., dis. Ibid.*

167. The first section of the act of 1812 contemplates a continuous out-boundary of the towns, to be so run as to include the out lots, common field lots, and commons of the towns, and the design of the act was to dispose of all the property included within the out-boundaries. *Scott, J., dis. Ibid.*

168. The confirming force of the act of Congress of June 13, 1812, (2 U. S. Stat. 748,) extends to common field lots, out lots, &c., as well without as within the survey of the out-boundary line of the town of St. Louis, the plat of which survey is commonly known as "Map X." *Milburn v. Hortiz*, xxiii. 532. *Tayon v. Hardman*, xxiii. 539. *Schultz v. Lindell*, xxiv. 567.

See SUPRA, 82, 83, 148.

l. LIMITATION.

169. Where a field lot, confirmed by the act of Congress of 1816, (3 U. S. Stat. 328,) has a definite and certain location, the statute of limitations will run in favor of an adverse possession prior to a survey by the United States, although

in the tabular list of the recorder the claim was stated to be "confirmed to be surveyed." *Aubuchon v. Ames*, xxvii. 89.

170. The United States survey of Carondelet common includes private claims; hence it would be erroneous to rule that twenty years' claim and user as common, by the inhabitants of Carondelet, of the land embraced in said survey, would bar the right of a private claimant who seeks to recover possession of land embraced in said survey, as confirmed by the act of Congress of June 13th, 1812. *Primm v. Haren*, xxvii. 205.

XI. SPANISH GRANTS.

171. A grant of land from the United States is valid against an unconfirmed Spanish grant. *Mullanphy v. Redman*, iv. 226.

172. The defendant in ejectment derived title under a grant made by Saint Ange, in 1769. It appeared in evidence that Saint Ange was an agent of the French Government, or commandant, and, after the cession of the ports on the East side of the Mississippi to the British, and on the West side to the Spanish authorities, in pursuance of the treaty of 1762, moved to St. Louis, where, from 1766 to 1770, his authority as military and civil commandant of that port was recognized by the inhabitants; that he had no authority from the Spanish Government till 1769, when, in conjunction with Piernas, the agent of the Captain General, O'Reilly, the concessions, &c., were re-surveyed, and the result recorded in *Livre Terrain* No. 2; and it further appeared that the concession under which the defendant derived title was not contained in that book—*Held*, that Saint Ange had no authority from the Spanish government to make grants of land; and if his authority to do so was in many instances recognized or confirmed by that government, the grant under which the defendant claimed was not among the number so recognized. *Wright v. Thomas*, iv. 577.

173. The rules of common law are inapplicable to the construction of grants and concessions of the royal domain during the Spanish government of Upper Louisiana. *Bird v. Montgomery*, vi. 510.

174. A claim to land by virtue of a Spanish grant and confirmation, described thus—"30,000 arpents sixty miles above the Osage, on the south side of the Missouri river, in which quantity shall be comprised the river à la Mine, and also the Salt Springs," &c., is not sufficiently specific to bring it within the reservations of the act of Congress of February 15th, 1811, (2 U. S. Stat. 617,) so as to prevail against a New Madrid location. The claims reserved by the act of 1811 were such as had a fixed locality, or could be reduced to a certainty by a survey. *Ashley v. Turley*, xiii. 430. [See *Bissell v. Penrose*, 8 How. 317.]

175. A party claiming title under one of two conflicting Spanish grants can not obtain the benefit of a confirmation upon the other, even though the former may have been illegally purchased by the confirmer before confirmation. *Charleville v. Chouteau*, xviii. 492.

176. As between two Spanish grants, it is well settled that the one first confirmed is the better title. *Ibid.* [See *Landes v. Brant*, 10 How. 370.]

177. As to the construction of a Spanish concession and the confirmation thereof, situated in St. Louis, "between Leecompte and Clamorgan." *St. Louis Public Schools v. Hammond*, xxi. 238.

178. The Spanish law superseded the French law in the District of Illinois (afterwards Upper Louisiana) as early as 1777. *Cutter v. Waddingham*, xxii. 206.

See EJECTMENT, 12, 13, 37, 38; . . . OFFICER, 1; . . . SUPRA, 41, 153, 155.

XII. NEW MADRID CERTIFICATES.

a. VALIDITY.

179. A New Madrid certificate granted through fraud or mistake is not void, but voidable, merely. *Stuart v. Rector*, i. 361. *Mitchell v. Parker*, xxv. 31. *Lee v. Parker*, xxv. 35.

180. A New Madrid certificate to A. B., or "his legal representatives," is valid. His legal representatives are those deriving title from him either by purchase or descent. Such certificate is not void because A. B. was dead at the time of its issue. *Bryan v. Wear*, iv. 106.

181. The act of Congress of February 17th, 1815, for the relief of the inhabitants of New Madrid, (3 U. S. Stat. 211,) provides that the title of the person who avails himself of the benefit of the act to the injured land shall revert to the United States. But in establishing his title to land located, the claimant need not prove any formal relinquishment of his New Madrid lands. His acceptance of the provisions of the act, as evidenced by his application to the recorder, and his location by the surveyor, is a virtual relinquishment, and no party but the government can complain of the want of a formal conveyance. *Wear v. Bryant*, v. 147. *Tindall v. Johnson*, v. 179.

See SUPRA, 39, 40, 141, 151, 153.

b. LOCATION.

182. The intention of the holder of such certificate in locating for himself can have no influence in determining the rights of parties. The bounty of Congress was to the owners of the injured lands, and they only; and those deriving title from them are entitled to the benefit of the located land. No other location under these certificates acquires any legal title. *Wear v. Bryant*, v. 147. *Tindall v. Johnson*, v. 179.

183. The holder of a New Madrid certificate had a right to locate it only on "public lands which had been authorized to be sold." If it was located on lands which were reserved from sale at the time of issuing the patent, the patent is void. *Wright v. Rutgers*, xiv. 585. [See *Stoddard v. Chambers*, 2 How. U. S. 284.]

184. There was no reservation from sale of the land claimed under a French or Spanish title, between the 26th of May, 1829, and the 9th of July, 1832. A location under a New Madrid certificate, upon any land claimed under a French

or Spanish title not otherwise reserved, made in this interval, would have been good. *Wright v. Rutgers*, xiv. 585. [See *Stoddard v. Chambers*, 2 How. U. S. 284.]

185. The location of a New Madrid certificate upon land reserved from sale, and the patent issuing therefor while the land remains so reserved, are entirely void, not merely voidable. *Easton v. Salisbury*, xxiii. 100. [See 2 How. 284. 8 How. 317, 345.]

186. Such a location, therefore, when made upon land reserved from sale by reason of its being covered by a Spanish claim, does not become valid so soon as the bar against that claim becomes complete. *Ibid.*

C. EVIDENCE.

187. Copies of New Madrid certificates and of surveys under them, certified by the Surveyor General, are not competent evidence; they should be sworn to. *Rector v. Welch*, i. 334.

188. Where one sells a New Madrid certificate, with a covenant that he had "full power, good right, and lawful authority to sell, dispose of and convey the same," an action on the covenant is not sustained by proof that the person to whom the certificate was issued was not the owner of the land in New Madrid in lieu of which it was granted, he having, previously to the issuing of the certificate, conveyed the same to a third person. *Stuart v. Rector*, i. 361.

189. A New Madrid certificate upon which a location and survey has been made, is properly deposited in the surveyor's office, and a copy may therefore be certified by him and given in evidence. *Bryan v. Wear*, iv. 106.

D. LIMITATION.

190. If a location and survey of land under a New Madrid certificate have been made within the time required by the act of Congress of 1822, (3 U. S. Stat. 668, § 2,) a failure on the part of the Surveyor General to make a return to the recorder will not render the location and survey void, though it might delay an appropriation of the land. *Cabunne v. Lindell*, xii. 184.

191. The statute of limitations does not commence running against a New Madrid claimant until the plat and survey of the land located have been returned to the recorder of land titles. *NAPTON, J., dis.* *Cabunne v. Lindell*, xii. 184. *Gray v. Givens*, xxvi. 291.

192. And where it appears from the "list of patent certificates prepared for issue by the recorder of land titles," that the recorder had prepared a patent certificate for issue to a claimant, it will be presumed that a plat of survey of the land upon which the certificate had been located had been previously returned to the recorder. *Gray v. Givens*, xxvi. 291.

E. ENUREMENT.

193. The "legal representatives" of the confirmer are those claiming under him by descent or purchase. If a certificate is issued and a location made, without the assent of the confirmer or his legal representatives, it will enure to their

benefit where there was an assent subsequent to the location, either express or implied, *Wear v. Bryant*, v. 147. *Tindall v. Johnson*, v. 179.

194. Where the owner of land in New Madrid sold his interest therein before the certificate for the location of land in lieu of that injured had issued, the title under the certificate vests in the vendee as the "legal representative" of the original owner. *Kirk v. Green*, x. 252.

195. Where the original owner of land in New Madrid sells it, and a location of other land is made in lieu thereof subsequently to such sale, the title to such located land vests in the vendee as the legal representative of the original owner, and although the deed be not recorded, it is valid as between the parties, and any conveyance of the located land made by the original owner will be inoperative, since the title to such land never vested in him. *Page v. Hill*, xi. 149.

196. Nor would a deed made by the original owner after such location, conveying the New Madrid land to a third person, vest the title to the located land in such person as the representative of the original owner. *Ibid.*

See EJECTMENT, 4, 8, 10, 11, 26 ; . . . LAWS, 37.

PUBLIC PRINTER.

1. Under the act of 1845, (R. S. 1845, 907,) the failure of the general assembly to elect a public printer did not create a vacancy which the governor could fill by appointment, but the incumbent, who was authorized to hold the office until his successor should be elected and qualified, held over. *Scott, J., dis. The State v. Lusk*, xviii. 333.

QUO WARRANTO.

1. Under Art. III, § 12, of the Constitution, the mere fact that the person appointed to an office had not, when appointed, paid into the treasury all public money which had come to his hands while holding another office, is not sufficient to constitute him a defaulter, so as to authorize a writ of *quo warranto* to issue against him. The petition for the writ should show that the person when appointed to the second office was in default, and accountable for public money. *Ex parte Bellows*, i. 115.

2. The court will not grant a writ of *quo warranto* against an officer to show by what authority he exercises his office upon a general statement that he is disqualified. *Ibid.*

3. A writ of *quo warranto* is in the nature of a writ of right for the State against any person who claims or exercises any office, to inquire by what authority he supports his claim, and issues as a matter of course, without any application to this court. *The State v. Perpetual Insurance Co.*, viii. 330. *The State v. Stone*, xxv. 555.

4. A *mandamus* may be issued to restore a person to an office to which he is entitled, but it cannot be issued where the office is already filled by a person holding by a color of right. In such a case a *quo warranto* is the proper remedy. *St. Louis County Court v. Sparks*, x. 117.

5. Where an act establishing a new county within the limits of an old one is unconstitutional, the sheriff of the old county may proceed by *quo warranto* against the person assuming to act as sheriff of the new county. *The State v. Scott*, xvii. 521.

6. A proceeding by information in the nature of a *quo warranto* is a civil proceeding; consequently, the Circuit Court has jurisdiction thereof in St. Louis county. SCOTT, J., *dis.* *The State v. Lingo*, xxvi. 496.

See JURISDICTION, 9, 11 ; . . . TOWNS, 1.

RAILROADS.

I. LABORERS LIEN.

II. FENCES.

I. LABORER'S LIEN.

1. Section 12 of the act to authorize the formation of railroad associations, &c., (Acts 1852-3, 128,) is applicable to the St. Louis and Iron Mountain Railroad Company, and to all other companies existing under a law of the State. *Peters v. St. Louis and Iron Mountain R. R. Co.*, xxiii. 107.

2. A laborer employed in the construction of a railroad by a sub-contractor, is entitled to the benefit of the railroad act of February 24, 1853, (Acts 1852-3, 128, § 12,) *Peters v. St. Louis and Iron Mountain R. R. Co.*, xxiv. 586. [See *Kent v. New York Central R. R. Co.*, 2 Ker. 628.]

3. And it is not necessary that the thirty days' labor for which a railroad company may be held liable under that section, should be performed upon thirty consecutive days. *Ibid.*

4. Demands against a railroad company, under the statute, (Acts 1852-3, 128, § 12,) were assigned to a party in order that he might collect them, and for his services he was to receive twenty-five per cent. of the amount collected, and pay all costs and charges—*Held*, that the assignee might sue in his own name. *Ibid.*

II. FENCES.

5. In an action to recover damages for injuries sustained through the omission of a railroad company to fence its road as required by statute, (Acts 1852-3, 148, § 51,) the question of care and diligence does not arise. If the road is not fenced as required by law, it matters not that the highest care is exercised by the agents of the corporation. *Gorman v. Pacific Railroad*, xxvi. 441.

6. Although as a proprietor a railroad company is under no greater obligation to fence its road than any other owner of land, yet, if the road be not fenced, that fact should be considered in estimating the degree of care to be exercised by the company. *Ibid*.

7. The degree of care to be exercised by a railroad company, in preventing the destruction of property, or other injuries, must be proportioned to the dangerous nature of the means and instruments employed by it. *Ibid*.

8. The owner of cattle is under no obligation to keep them on his own premises; but where he permits them to roam at large, and they go upon the track of a railroad and are injured unavoidably, through no want of care on the part of the agents and servants of the railroad company, he is without redress. *Ibid*.

See LAWS, 44, 45; . . . LOCAL DECISIONS, III, IV, V; . . . ST. LOUIS, XIV; . . . WAY, 25.

RECOGNIZANCE.

I. RECOGNIZANCE OF BAIL.

II. RECOGNIZANCE ON APPEAL.

- a. FORM AND REQUISITES.
- b. TIME OF FILING.
- c. NECESSARY TO PERFECT APPEAL.
- d. ACTION ON.
 - aa. Pleading.
 - bb. Judgment.

I. RECOGNIZANCE OF BAIL.

1. A plea to an action on a recognizance of bail, that the principal was surrendered before a declaration was filed against the bail, is bad; it should be that he was surrendered before the return of process against the bail executed. *Easton v. Collier*, i. 467.

2. The action on a recognizance of bail is not local, but may be brought in a different county from that in which the original action was pending. *Easton v. Collier*, i. 467, 603.

8. The fact that the principal in a recognizance was prevented from surrendering himself to the officer serving the execution, in discharge of his bail, by the fraudulent representations and interference of the plaintiff, is no bar to a suit on such recognizance. *Easton v. Collier*, i. 603.

See PLEADING, 94 ; . . . SCIRE FACIAS, II.

II. RECOGNIZANCE ON APPEAL.

a. FORM AND REQUISITES.

4. Under the provisions of the statute, (Gey. Dig. 261, § 54,) it was not necessary for the appellant to be a party to the recognizance taken on an appeal from the Circuit Court to the Supreme Court. The recognizance of the surety was as binding on him as though the appellant had not been named in it. *Ober v. Pratte* and *Bird v. Cromwell*, i. 8.

5. Where the statute required the recognizance of appeal from the judgment of a Justice to be subscribed by the appellant, (Gey. Dig. 389, § 16,) an appeal is properly dismissed for want of his signature thereto. *Nichols v. St. Louis Circuit Court*, i. 357.

6. Under a statute, providing that the condition of a recognizance given by a plaintiff on an appeal from a judgment of a Justice, shall be, that "if the judgment of the Justice is affirmed, or if the plaintiff shall recover less," &c., (1 Ter. L. 309, § 7,) a bond conditioned that "if the judgment be affirmed, or if the defendant shall recover more, then the plaintiff shall pay costs," &c., was held to be a substantial compliance with the statute. *Strange v. Ellis*, i. 412.

7. An instrument termed "a bond by the Justice," signed by the Justice, in his character as such, on the left hand side of the page, without using the word "test," or "witness," or the words "signed in the presence of," is good as a recognizance, under the statute. (1 Ter. L. 309, § 7.) *Sargent v. Sharp*, i. 601.

8. The recognizance on an appeal from a Justice must be made to the appellee, and if made to the State of Missouri, it is defective in substance, and cannot be remedied in the Circuit Court. (See R. S. 1825, 480, § 22.) *Price v. Halsey*, iii. 461.

9. Where an appellant prays an appeal from a Justice, and files his affidavit, which is certified by the Justice, and also files an appeal bond, which is not certified by the Justice—*Held*, sufficient evidence of an appeal, and that it was the duty of the Justice to certify the bond, and the appellate court was correct in allowing a new bond to be filed in that court. *Jones v. Davis*, iv. 28.

10. If the Justice fail to approve and attest a recognizance for an appeal, it is void. *Cockrill v. Owen*, x. 287.

11. An appeal bond, payable to Joseph, which should have been made payable to John, is bad, and the court is not bound to allow the appellant to amend, but may dismiss the appeal. *Smith v. Keenan*, xiv. 529.

12. A recognizance would not be void if the character of the parties, as plaintiff and defendant, were entirely omitted. Nor if the characters are trans-

posed by an error of the clerk, if it clearly appears to have been only an error. *Halsall v. Meier*, xxi. 136.

13. It is error to dismiss an appeal on the ground that the recognizance stated the appeal to be to a wrong court, (the transcript having been filed in the proper court,) a motion for leave to amend having been made before the motion to dismiss was disposed of. *Matthews v. Gloss*, xxii. 169.

14. A recognizance taken on an appeal from a Justice to the St. Louis Land Court, made payable to "M. S. and others, plaintiffs in this suit," and containing a clause in the condition, that "if on the trial anew in the Land Court or Law Commissioners' Court," &c., is sufficient. *Smith v. Montreil*, xxvi. 578.

b. TIME OF FILING.

15. An appeal from a Justice should be dismissed where it appears that the affidavit and recognizance were not taken until several days after the appeal was granted. *Filley v. Walls*, iv. 271.

16. A recognizance for an appeal from the judgment of a Justice, is void, if not entered into in the time and manner prescribed by law. (See R. S. 1845, 667.) *Adams v. Wilson*, x. 341.

c. NECESSARY TO PERFECT APPEAL.

17. An appeal from a Justice's court is not taken until a recognizance is entered into and approved by the Justice, although the Justice's docket may show that an appeal was applied for and allowed on the day of trial. *Slater v. St. Bt. Convoiy*, x. 513.

d. ACTION ON.

aa. Pleading.

18. The recognizance for an appeal from the judgment of a Justice, is strictly a recognizance, and not a penal bond, and breaches must not be assigned in a suit upon such an instrument. *Cockrill v. Owen*, x. 287.

19. A Justice has jurisdiction in actions upon such recognizance. *Ibid.*

bb. Judgment.

20. If, upon the trial of an appeal in the Circuit Court, judgment is rendered against the appellant, but not against his security in the recognizance, an action against the surety upon the recognizance, is not barred by such omission. *Cockrill v. Owen*, x. 287. *Unterrein v. McLane*, x. 343.

21. In a suit on a recognizance, taken on an appeal from a Justice, no assessment of damages is required, but the judgment is for the penalty, and in some cases, for interest thereon. *Ibid.*

22. In a *scire facias* on such recognizance, if no plea be filed, judgment will be rendered at the first term. *Ibid.*

23. The judgment cannot exceed the penalty of the recognizance, and interest thereon. *Ibid.*

24. Where a party becomes surety for two co-defendants in an appeal bond, and a verdict is given in favor of one and against the other, in the appellate court, judgment on the bond may be entered against the surety. *Hood v. Mathis*, xxi. 308. See JUDGMENT, 80.

See CRIMINAL LAW, 250-261 ; . . . FORCIBLE ENTRY AND DETAINER, V ; . . . LAWS, 46.

RECORD.

I. FROM OTHER STATES—AUTHENTICATION.

II. EVIDENCE.

- a. PAROL.
- b. EFFECT AND ADMISSIBILITY.
- c. OBJECTION TO.
- d. LOST RECORD.
- e. OFFICE COPY.
- f. LIVRE TERREIN.
- g. DEED.
- h. OF COUNTY COURT.
- i. JUDGMENT.
- j. SPANISH RECORD.
- k. OF LAND OFFICE.
- l. FORMER RECOVERY.
- m. INTERPLEADER.

I. FROM OTHER STATES—AUTHENTICATION.

1. To render an office copy of a deed recorded in another State, admissible in evidence here, it must appear by the certificate of the clerk, in certifying the official character of the judge, that he is the presiding judge or justice of the court of which he is clerk. Therefore, the certificate of the clerk of the County Court of Hartford County, that A. B. is presiding judge of the sixth judicial district, composed of Baltimore and Hartford counties, is insufficient. *Paca v. Dutton*, iv. 371.

2. *Quære*, Whether the words "duly commissioned and sworn" are equivalent to the words "duly commissioned and qualified?" *Ibid*.

3. The certificate of a presiding judge of a Court of Record of another State, that the attestation of the clerk of such court, is, in due form and by the proper officer, is conclusive evidence that the certificate contains all the facts which, by the laws of that State, it should have certified. *Rennick v. Chloe*, vii. 197.

4. Under the Act of Congress of 1790, (1 U. S. Stat. 122,) it is indispensable that the judge should state in his certificate, that the attestation of the clerk is in due form. *Duvall v. Ellis*, xiii. 203. *Wilburn v. Hall*, xvi. 426.

5. And where a court of another State is not so constituted as to bring it

within that act, its proceedings may be authenticated in the common law form. *Ibid.*

6. In the authentication of a foreign record, under the Act of Congress of 1790, the words "my seal of office," in the certificate of the Clerk of the Court, are synonymous with the seal of the court. *McLain v. Winchester*, xvii. 49.

II. EVIDENCE.

a. PAROL.

7. Matters of record cannot be proved by parol. Where, therefore, in a suit for the possession of a mare, it was attempted to base a defense upon the fact that the mare had been taken out of the possession of plaintiff by virtue of a writ, the fact of the issue of such writ, and the proceedings under it, must be established by the record. *Wynne v. Aubuchon*, xxiii. 30.

See EVIDENCE, 65-70.

b. EFFECT AND ADMISSIBILITY.

8. In a suit brought by an assignee against the sheriff, for seizing the assigned property, the record of the attachment suit, in which the goods were taken, is inadmissible to show that the assignment was fraudulent. *Wise v. Wimer*, xxiii. 237.

9. In an action against a constable, for the seizure of goods under an attachment issued by a Justice, the record of the proceedings in the case, is competent evidence for him. *Snead v. Wegman*, xxiii. 263.

c. OBJECTIONS TO.

10. Where a record is proper evidence of a fact, it will be admitted, and the opposite party is left to his motion to exclude the irrelevant matter in the record from the consideration of the jury. *Soulard v. Clark*, xix. 570.

11. And the particular objections must be specified. *The State v. Gates*, xx. 400. *McCartney v. Shepard*, xxi. 573.

d. LOST RECORD.

12. To entitle a party to give parol evidence of the contents of original papers, in a suit tried before a Justice whose term has expired, he must first prove their loss, either by the official certificate of the successor of such Justice, or by his examination under oath. *Apperson v. Ingram*, xii. 59.

e. OFFICE COPY.

13. Concerning marriage contracts and other papers, which, according to the usages and customs of the Spanish Government in Upper Louisiana, were deposited among the archives of the government, and copies merely delivered to the parties, those copies are admissible in evidence—1st, when sworn to; 2nd, when certified by the officers of our government, who may have the custody of the origi-

nals; 3rd, when certified by the Spanish authorities, who had, at the time, the custody of the originals, with the additional proof that the person certifying was acting in the office which he pretends to fill, and that the signature to the certificate is in his hand-writing. *Chouteau v. Chevalier*, i. 343.

14. An office copy of a public record will be presumed to be correct. *Bettis v. Logan*, ii. 2.

15. Such a copy from the records of the Supreme Court, in a case remanded to the Circuit Court, is a record of the Circuit Court when filed therein, and an official transcript of it is evidence of the facts it contains. *Ibid.*

16. A certified copy of a part of a record is not admissible. The whole record must be certified. *Philipson v. Bates*, ii. 116.

17. A copy of a deed made and recorded in 1816, and certified by the *ex-officio* recorder, is not evidence, as the law did not authorize the recorders to make and certify such copy. *Strother v. Christy*, ii. 148.

18. In an action on a judgment, a certified copy of a bill in chancery, filed by the defendant against the plaintiff, is not evidence, and will be excluded, although it appear in the transcript of the judgment record. *Blair v. Caldwell*, iii. 353.

19. To render a certified copy of a record admissible in evidence, it must appear that the original was a public record, kept in pursuance of the laws of the State where it was made. *Haile v. Palmer*, v. 403.

20. An office copy of the record of a deed, regularly acknowledged and recorded, is admissible in evidence when the original has been lost, or is not within the power of the party offering to produce it. *Bosworth v. Bryan*, xiv. 575.

21. Although a certified copy of any record or public paper, by the officer entrusted with its custody, is evidence if the original would be, yet neither would be evidence of matters which the officer was not legally bound to record. *Chil-dress v. Cutter*, xvi. 24.

22. A certified copy from the record of a memorandum of sale, not a Spanish archive, executed December 26th, 1786, and not recorded before the year 1811, may, under the statute, (R. S. 1845, 469, §§ 17-19,) be read in evidence only upon proof of such facts and circumstances as, together with the certificate of acknowledgment or proof, will satisfy the court that the person who executed the instrument is the person therein named as grantor. *Aubuchon v. Murphy*, xxii. 115.

23. Where a deed of conveyance is duly acknowledged and recorded, and is shown not to be within the power of the party wishing to use it, an office copy thereof is admissible, and no notice to produce the original is required. *Gilbert v. Boyd*, xxv. 27.

f. LIVRE TERREIN.

24. A grant appearing on the land book called *livre terrain*, will not be considered as existing by matter of record, without evidence that the *livre terrain* is of itself a record. *Hill v. Wright*, iii. 243.

25. The land book, or *livre terrain* No. 2, made under the authority of the Spanish government, is a public record. *Wright v. Thomas*, iv. 577.

26. The entries made in *livre terrein* upon the margin of the records of Duralde's Spanish surveys of common field lots, showing an abandonment of those lots and a re-uniting them to the king's domain, are admissible in evidence, in a suit founded on an alleged confirmation by the act of Congress of 1812, (2 U. S. Stat. 748,) to show that under the Spanish government it was not unusual for the inhabitants to abandon their possessions. *Pine v. St. Louis Public Schools*, xxiii. 570.

g. DEED.

27. A party not entitled to the original deed may give the record of it in evidence when the original would be competent, although the original has not been lost or destroyed. *Walker v. Newhouse*, xiv. 373.

h. OF COUNTY COURT.

28. The records of the County Court reciting a transcript filed therein from a Justice, may be read in evidence without producing the transcript. *Huston v. Becknell*, iv. 39.

i. JUDGMENT.

29. A. made a promissory note to B., who indorsed it to C., and C. indorsed it to D.—*Held*, in a suit by C. against B. on this indorsement, that a record of a suit by D. against A., in which suit A. was prosecuted to insolvency, was admissible to prove diligence on the part of C. *Lane v. Clark*, i. 657.

30. Where a party to a suit claims title under an execution sale, the record of the judgment or decree on which the execution issued is conclusive evidence that such judgment was rendered, and of all the legal consequences of that judgment. *Jones v. Talbot*, ix. 120.

31. In an action by A. against B. to recover the price of a cow sold by B. to A., on the ground that B. had no title to sell, the record in a suit between A. and C., who claimed the cow, wherein C. recovered judgment, is not competent evidence to show title in C., nor for any other purpose, unless B. had notice of the suit. But the person of whom B. bought the cow is a competent witness for him. *Fallon v. Murray*, xvi. 168.

32. Where a record is used in evidence merely to show that there was a certain judgment, it is necessary to put in only such part of the record as is relevant. But where the record is offered in evidence to prove the facts therein contained, the whole record must be produced. *Lee v. Lee*, xxi. 531.

33. A. contracted to build a house for B. and C., and A. agreed to secure B. against all liens, claims and losses. Liens were filed by sub-contractors against said house, upon which writs of *scire facias* were issued against A. and B. These writs were served upon B., but not upon A. Judgments by default were rendered against B., which he paid—*Held*, in a suit instituted by B. against C. to recover for breach of the agreement, that the record in the suits against B. were admissible to show the amount of the judgments and the payment of them by B., but were not conclusive upon C., neither C. nor A. having notice of the commencement of proceedings by *scire facias*. *Picot v. Signiago*, xxvii. 125.

j. SPANISH RECORD.

34. Where an instrument was executed before the Lieutenant Governor of a Spanish province, and deposited in the archives of the government a copy of the same, duly certified by the recorder of the county where it was deposited, is entitled to be received in evidence under the statute, (R. S. 1845, 469, § 13.) *Charlotte v. Chouteau*, xxi. 590.

See SUPRA, 13.

k. OF LAND OFFICE.

35. Where the surveyor of the lands of the United States in Missouri certifies copies of papers required by law to be deposited in his office, it is not necessary to prove his handwriting in order to the giving of such copies in evidence. *Bryan v. Wear*, iv. 106.

l. FORMER RECOVERY.

36. A former recovery may be given in evidence under the general issue. *Hempstead v. Stone*, ii. 65.

37. The record of a former recovery apparently for the same cause of action, is *prima facie* evidence only that such recovery was for the same cause of action, and may be repelled by evidence showing that the ground of the subsequent action is separate and distinct from the demand made on the former trial, and arose out of a separate transaction. *Brown v. King*, x. 56. *The State v. Morton* xviii. 53.

m. INTERPLEADER.

38. The plaintiff instituted suit by attachment against one A., and attached as his certain property, which was claimed by B., who interpleaded. The defendant agreed with the plaintiff that if he would permit the attached property to be delivered to B. to be sold, he would pay the plaintiff the amount of the proceeds of the sale, or deliver to him similar property, in the event that the interpleader should be finally decided against B.—*Held*, that to entitle the plaintiff to recover upon this agreement, it was not necessary to prove that the property attached belonged to A.; the determination of the interpleader in favor of the plaintiff fixed defendant's liability; that, although the defendant was a stranger to the interpleader, the record of it was proper evidence to show how it was determined; that it was not necessary for the plaintiff to aver or prove that the defendant had notice of the termination of the interpleader, nor to aver or prove a demand of the money or property, nor to aver or prove that the defendant had notice of the net proceeds of the sale of the attached property, to enable him to recover. *Walsh v. Agnew*, xii. 520.

See ADMINISTRATION, 7; . . . COURTS, III; . . . EVIDENCE, 65-70.

RELEASE.

1. Where an execution creditor received from one of several joint execution debtors a part of the amount due, and agreed in writing, not under seal, to discharge him from further liability, it was *held*, that such payment and agreement to discharge did not operate to discharge the whole judgment, or to release the other debtors therein. *McAllister v. Dennin*, xxvii. 40. [And see R. S. 1855, 873, § 14.]

See PLEADING, 51.

REPLEVIN.

- I. WHEN IT LIES.
- II. DEMAND.
- III. PARTIES.
- IV. PLEADING.
- V. EVIDENCE.
- VI. DAMAGES.
- VII. JUDGMENT.
- VIII. BOND.
- IX. PROCEEDINGS BEFORE JUSTICE.
- X. CAPIAS.

I. WHEN IT LIES.

1. Detinue will lie where the property proclaimed has been taken from the possession of plaintiff tortiously. *Overfield v. Bullitt*, i. 749.

2. Where the plaintiff sued as administrator, and showed property in his intestate, and possession and detainer by the defendant since the death of the intestate—*Held*, that the action would not lie, as the possession and detainer was against the administrator in his own right. *Melton v. M' Donald*, ii. 45.

3. To support an action in detinue, the plaintiff must have either a general or special property in the chattel sued for; and if special, it must result from actual possession, or be coupled with an interest therein. *Ramsay v. Barcroft*, ii. 151.

4. Replevin will lie although there was no actual taking from the plaintiff, or trespass committed by the defendant. *Crocker v. Mann*, iii. 472. *Skinner v. Stouse*, iv. 93.

5. The action of replevin under our statute, (R. S. 1825, 659,) is not local but transitory. *Crocker v. Mann*, iii. 472.

6. Where the owner of property stands by and sees another sell it, and says nothing when he might properly speak, and especially if he encourages the sale, he cannot afterwards recover the property. *Skinner v. Stouse*, iv. 93.

7. The possession of the wife is the possession of the husband. *King v. Bailey*, vi. 575.

8. A person claiming land as a pre-emptor, cannot maintain replevin for timber cut thereon, before his right has been proved. *Bower v. Higbee*, ix. 256.

9. Replevin will not lie for an injury to the bare possession of property; there must be a general or special property. *Broadwater v. Darne*, x. 277.

10. A special property in the thing taken is sufficient to sustain the action of detinue. *Schulenberg v. Campbell*, xiv. 491.

11. Property originally obtained by a trespass may be recovered in detinue, as the trespass may be waived. *Ibid.*

12. A party who never has had the actual possession of personal property, and who is not the general owner of it, cannot maintain replevin against a party in actual possession. *Holliday v. Lewis*, xv. 403.

13. A purchaser of personal property at sheriff's sale, under an execution against a mortgagor in possession, cannot maintain replevin against the mortgagor. The mortgagor, in such case, is not estopped from setting up a want of property in the subject of the sale. *Yeldell v. Stemmons*, xv. 443.

14. Purchase at a sheriff's sale, and possession thereunder, make a *prima facie* title in an action of replevin. *Kingsbury v. Lane*, xvii. 261.

15. Where there is only an agreement to sell a slave and not a sale executed, an action for the possession cannot be maintained; the remedy is by an action on the contract for damages. *Suggett v. Cason*, xxvi. 221.

II. DEMAND.

16. Where the possession of personal property is obtained without the privity or consent of the owner, no demand of it is necessary to enable the owner to maintain detinue therefor. *Irwin v. Wells*, i. 9.

17. A demand is not necessary to sustain detinue for logs cut and carried away from lands of the plaintiff. *Schulenberg v. Campbell*, xiv. 491.

III. PARTIES.

18. Husband and wife may join in an action of detinue for the recovery of property of the wife detained from her before the marriage. *Haile v. Palmer*, v. 403.

19. But the declaration must set out the interest of the wife. It is not sufficient to allege simply that the husband and wife were possessed of the property as of their own goods, &c. *Ibid.*

20. Where an action of detinue is brought by a tenant in common of a chattel, without joining his co-tenants, the non-joinder may be pleaded in abatement, or may be taken advantage of on the trial, although the form of action is *ex delicto*. *Smoot v. Wathen*, viii. 522.

21. Joint tenants, or tenants in common, of a chattel, must join in an action for the recovery of the chattel or its value. *Ibid.*

22. Where A. conveys personal property in trust for the payment of a debt, and afterwards conveys the same property directly to the creditor, the legal title is in the trustee, and the property being in the possession of a fourth party, a suit for its recovery is properly brought in the name of the trustee. *Bergesch v. Keevil*, xix. 127.

IV. PLEADING.

23. To maintain the action of detinue, the plaintiff must have in himself the right of property, coupled with the right of immediate possession, and must so allege in his declaration. The omission of such allegations is fatal, even after verdict. *Melton v. M'Donald*, ii. 45.

24. In replevin, a plea of property in the plaintiff and another, is good, both in bar and in abatement. *Phillips v. Townsend*, iv. 101.

25. To a plea in replevin, which alleges property in one P. and N., a replication is bad that alleges that P. and the plaintiff are the same, without noticing N. *Ibid*.

26. A plea in bar to an action of detinue by a ferryman, which alleges that his fees were not paid, and that the plaintiff entered his boat without his consent, is bad, both as double and as amounting to the general issue. *Pomeroy v. Donaldson*, v. 36.

27. In an action of replevin, the defendant pleaded in abatement, that "he was in possession of the property as the receiver in a suit of chancery, in which A. was plaintiff, and B. (the plaintiff in this suit,) was defendant, and that the said property was put into his hands and possession as receiver, by virtue of legal authority"—*Held*, that the plea was defective, in not showing how, when and where he was appointed receiver. *Armstrong v. McMillon*, ix. 712.

28. In an action of replevin, a plea of justification, alleging that the defendant, as constable, seized the property by virtue of an execution, where the party in possession of the property was not the defendant in the execution, must aver that the property belonged to the defendant in the execution. *Smith v. Winston*, x. 299.

29. In a proceeding under the new code, to recover possession of personal property, the value of the property need not be stated in the petition if it is stated in the affidavit; nor is the omission of the jury to find the value a fatal error. *Schaffer v. Faldwesch*, xvi. 337.

V. EVIDENCE.

30. In an action for the recovery of personal property, it is competent for a witness to testify as to the value of the property, or as to what it would sell for. *Easton v. Woods*, i. 506.

31. To an action of replevin, the defendants pleaded *non cepit*. The evidence of taking was, that the horses, &c., sued for, were ranging about the farm, and

that the defendants exercised authority on the place, by prohibiting the plaintiff from removing them—*Held*, sufficient proof of the taking. *Moore v. Moore*, iv. 421.

32. Under the plea of “not guilty,” in an action of replevin, evidence is admissible to show that the plaintiff is not entitled to the possession of the property replevied, and that a deed under which the property is claimed is void. *Gibson v. Mozier*, ix. 254.

VI. DAMAGES.

33. Evidence of a re-delivery of property, by which the party has been restored to his former condition, may be given in mitigation of damages; but where a son of the plaintiff forcibly took possession of the property, which was immediately re-taken from him, this was *held* to be in no sense a reparation. *Easton v. Woods*, i. 506.

34. In an action of replevin, where the plaintiff fails to prosecute his suit with effect, the assessment of damages is imperative, and may be made by the court, if neither party requires a jury. *Reed v. Wilson*, xiii. 28.

35. In an action of detinue, where the slave sued for dies before judgment, the measure of damages is the use and hire of the slave up to the time of his death. *Haile v. Hill*, xiii. 612.

36. Where a slave has been detained by virtue of a writ of replevin, a judgment for his value, in damages, for the defendant, would be erroneous. *Lawrence v. Lawrence*, xxiv. 269.

See *INFRA*, VII, 46, 49, 50.

VII. JUDGMENT.

37. A. brought an action of replevin against B. for a slave; B. pleaded property in said slave in C., which plea was found for B., and judgment given upon it for him. C. afterwards conveyed the slave to A., who brought another action of detinue against B. for the slave—*Held*, that the finding and judgment on the plea of property in C. were conclusive between the parties, and that B. was estopped to dispute property in the slave at the commencement of the first suit. *TOMPKINS, J., dis. Penrose v. Green*, i. 774.

38. In detinue for two slaves, the judgment should be for the separate value of each, and not for their aggregate value. *Mullikin v. Greer*, v. 489.

39. If a plaintiff, in an action of replevin, takes a non-suit, the defendant is entitled to the same judgment and damages as if he had recovered a verdict against the plaintiff. *Smith v. Winston*, x. 299.

40. In a suit for the possession of a slave, it appeared from the facts found by the court that the slave belonged to the plaintiff, was in the possession of the defendant, and had escaped therefrom after the commencement of the suit; but it did not appear whether or not the possession of defendant was wrongful—*Held*,

that the finding was defective, and that a judgment for the defendant was erroneous. *Barksdale v. Appleberry*, xxiii. 389.

41. In an action for the possession of a slave, in which its value was alleged to be nine hundred dollars, and the damages for the detention one hundred dollars, the jury did not find the value of the slave, but "assessed the damages at eight hundred dollars" — *Quære*, whether a judgment for such sum could be supported? *Beale v. Dale*, xxv. 301.

VIII. BOND.

42. In a suit on a bond which had been given in an action of detinue, it is no defense that the affidavit in the action of detinue varied in its description of the property from the description in the declaration. *McDermott v. Doyle*, xi. 443.

43. The objection should have been taken to the affidavit on the trial of the original suit. *Ibid.*

44. The suit upon the bond for a failure to deliver the property is a mere continuation of the original suit, and must be brought in the same court in which the original suit was brought. *Ibid.*

45. In suits for the possession of personal property, under the new code, (Acts 1848–9, 82, Art. VIII,) the provisions of the replevin act of 1845 are applicable as far as it may be necessary to resort to them to prevent a failure of justice; the provisions of the new code govern as far as they are practicable. *Collins v. Hough*, xxvi. 149.

46. Thus, where, under the new code, the plaintiff gives a return bond and receives the property sued for, and fails to prosecute the action, an assessment of the value of the property, and damages for its detention, may be made, and judgment against plaintiff rendered as directed in statute of 1845. (R. S. 1845, 922, §§ 8, 9.) *Ibid.*

47. And the plaintiff cannot avoid this by taking a non-suit. *Berghoff v. Heckwolf*, xxvi. 511.

48. And summary statutory proceedings against the sureties in the return bond must be had, under the new code. (Acts 1848–9, 84, § 9.) *Collins v. Hough*, xxvi. 149.

49. Double damages for the detention of the property by the plaintiff cannot be given against his sureties. *Ibid.*

50. The condition in the bond, given under the statute, (Acts 1848–9, 83, § 3,) to prosecute the action, is a condition to prosecute it with effect—that is, with success; and a voluntary non-suit amounts to a breach, and the obligee may recover full damages within the limit of the penalty, notwithstanding he may have failed to obtain a judgment for the return of the property, or for damages. *Berghoff v. Heckwolf*, xxvi. 511.

IX. PROCEEDINGS BEFORE JUSTICE.

51. In actions brought, under the statute of 1849, (Acts 1848–9, 67,) before a Justice for the recovery of personal property, the proceedings must be governed

by Art. VIII of the new code. (Acts 1848-9, 82.) *McKnight v. Crinnion*, xxii. 559.

X. CAPIAS.

52. Under the practice act of 1849, the action of detinue was abolished; and since the passage of that act there is no such action, nor any power to issue a capias in such action. *Moore v. Chamberlin*, xv. 238.

See ACTION, 51-53; . . . ADMINISTRATION, 56; . . . APPEAL, 19; . . . COSTS, 38; JURISDICTION, 69.

REVENUE.

I. ASSESSMENT.

II. PROPERTY EXEMPT FROM TAXATION.

III. SALE OF LAND FOR TAXES.

IV. TAXATION BY MUNICIPAL CORPORATION.

a. WHAT PROPERTY MAY BE TAXED.

b. SALE.

c. REMEDY FOR ILLEGAL TAXATION.

V. COLLECTOR.

a. LIABILITY.

b. SHERIFF AS COLLECTOR.

c. SETTLEMENT.

d. BOND.

e. ACTION AGAINST COLLECTOR.

f. APPEAL.

VI. SCHOOL TAXES.

VII. ACTION FOR COLLECTION OF.—EVIDENCE.

I. ASSESSMENT.

1. That clause in the Constitution of Missouri which provides "that all property subject to taxation in this State shall be taxed in proportion to its value," (Art. XIII, § 19,) is mandatory upon the General Assembly, and furnishes a rule from which they may not depart. What property shall be subjected to taxation is left to their discretion, but the rule for making the assessment they cannot change. *Hamilton v St. Louis County Court*, xv. 3.

2. That clause does not require that all the property in the State shall be taxed, but that, where any property is selected for taxation, it shall be taxed in proportion to its value. *The State v. North*, xxvii. 464.

3. It is applicable only to taxation in its usual, ordinary and received sense, to taxation for general, State, county or city purposes, and not to local assessments, where the money raised is expended on the property taxed. *Egyptian Levee Co. v. Hardin*, xxvii. 495. *Same v. Cummins*, xxvii. 495.

4. Where a lease is made without any stipulation about taxes, the landlord is bound to pay the taxes upon the property; but if the tenant, by any improvements authorized by the lease, enhances the taxes, the landlord is not bound to pay the additional taxes. *Leach v. Goode*, xix. 501.

See *INFRA*, VII.

II. PROPERTY EXEMPT FROM TAXATION.

5. Under the statute which exempts from taxation school-houses and other buildings for the purposes of education, (R. S. 1845, 928, § 2, cl. 8,) a building used in part for a school-house and in part for other purposes, is not exempt. There can be no separate assessment for the part not used as a school-house. *Wyman v. City of St. Louis*, xvii. 335.

III. SALE OF LAND FOR TAXES.

6. Sales of land for taxes are proceedings *in invitum*, and against common right. The statute authorizing such sales must be strictly construed, and its requirements strictly complied with. The presumptions in favor of the regularity of official action, and that a public officer has done his duty, do not apply in these sales. *Morton v. Reeds*, vi. 64. *Reeds v. Morton*, ix. 868.

7. The auditor's certificate, required by the statute (2 Ter. L. 131, § 11,) to be transmitted to the recorder of the county where the lands lie, is only evidence of his own acts. *TOMPKINS, J., dis. Ibid.*

8. And it is only evidence of such acts of his as are therein particularly set out. *TOMPKINS, J., dis. Ibid.*

9. The statement in such certificate that "the provisions of the law in such cases made and provided have been complied with," is wholly insufficient. *TOMPKINS, J., dis. Ibid.*

10. The lands and lots subject to entry at the office of the Register of Lands, under § 29 of the act of February 27th, 1843, providing for the sale of lands for taxes, (Acts 1842-3, 137,) are the lands and lots embraced within the first clause of the first section of that act, viz: lands and lots sold or forfeited to the State for taxes, and upon which the taxes have been due and unpaid for six years. Therefore, where the petitioner applied to the register to enter certain lands delinquent for the years 1837-8, and it appeared that the lands were not returned until the 13th of December, 1837—*Held*, that they were not subject to entry. (See Acts 1836-7, 132, § 4.) *Campbell v. Heard*, viii. 519.

11. The provision in the statute of 1825, relating to the collection of revenue, (R. S. 1825, 674, § 28,) which requires the certificate of the sale of land for taxes

to be recorded, was to give to the owner of the land additional means of ascertaining that his land had been sold. *Reeds v. Morton*, ix. 868.

12. And the certificate of sale must be recorded in reasonable time, or the deed will be void; and it is nugatory to do so after the time of redemption expires and the deed has been made. *Ibid.*

13. A deed, from the register of lands, of lands sold for taxes, of itself makes no title. *Bosworth v. Bryan*, xiv. 575.

14. Where several parcels of land are sold separately, according to law, at a tax sale, the purchaser is entitled to a deed reciting the real facts of the sale, that all may appear to have been done legally. But it is not essential that the register should state in the deed, after due examination, he was satisfied that all the requirements of the law had been complied with. The deed itself is evidence of that, as the register should not issue it unless satisfied. *The State v. Richardson*, xxi. 420.

15. Under the revenue law of 1845, (R. S. 1845, 952, § 18,) and of 1847, (Acts 1846-7, 122, § 30,) no title to land sold for taxes passes until the register executes the deed, and the deed does not relate back to the sale. The act of 1849, (Acts 1848-9, 111, § 4,) only applies to sales made after its passage. *Donohoe v. Veal*, xix. 331.

See *INFRA*, 17-18.

IV. TAXATION BY MUNICIPAL CORPORATION.

a. WHAT PROPERTY MAY BE TAXED.

16. The legislature cannot authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits. *Wells v. City of Weston*, xxii. 384.

b. SALE.

17. A purchaser at a tax sale, under city ordinances, takes no title unless due notice has been given of the sale, as prescribed in the ordinances. *Nelson v. Goebel*, xvii. 161.

18. No presumption is to be made in favor of tax titles under city ordinances. The party who relies on a tax title must, in order to succeed, show that all the necessary prerequisites to a legal sale have been complied with. If any city officer has failed to give a proper description of the lot, as required by ordinance, the title of the city and its grantees will fail. *Ibid.*

c. REMEDY FOR ILLEGAL TAXATION.

19. Taxes paid to a city collector, with a full knowledge of all the facts, the city having color of right to collect them, is regarded as voluntary, and not made under such circumstances as will authorize the party paying them to recover them back. If a part of a tax is legal and a part illegal, the proper mode for the party to pursue is to tender the amount legally due and resist the excess. *Walker v. City of St. Louis*, xv. 563. *Christy v. City of St. Louis*, xx. 143.

20. Illegal taxes, assessed under color of law, and voluntarily paid to a city, cannot be recovered back on the ground that the city has no right to take and retain money which it has, by charter, no right to demand. *Christy v. City of St. Louis*, xx. 143.

21. So an administrator cannot recover back taxes illegally assessed and voluntarily paid to a city, on the ground that the city has no right to take and retain money which it has no right by charter to demand. *Ibid.*

V. COLLECTOR.

a. LIABILITY.

22. Where the tax books are delivered to the collector, and the amount thereof is charged against him on the books of the auditor of public accounts, the collector becomes responsible for the amount, and his resignation of his office will not affect that responsibility, whether he proceeds to collect the taxes or not. *Howard v. The State*, viii. 361.

23. The sheriff, as such, and not as the collector, is responsible for the money collected by sale of lands for taxes, under the act of February 27th, 1843. (Acts 1842-3, 137.) *Moss v. The State*, x. 338.

24. A collector who has collected and paid over to the county, taxes assessed at a higher rate than that allowed by law, is not liable for the excess to the taxpayers, nor can he recover back the excess, so paid over, from the county. *Lewis County v. Tate*, x. 650.

b. SHERIFF AS COLLECTOR.

25. A sheriff was required by law to give bond and security "for the faithful discharge of the duties appertaining to his office," (1 Ter. L. 256, § 1,) and gave a bond, the condition of which was that he "should well and truly perform the duties of Sheriff, according to law, to the best of his knowledge and abilities, and make faithful payment of all moneys he might collect, either for the public or individuals." By another law the sheriffs of the different counties were made collectors of the public revenues, and were required to give bond and security for the faithful collection and payment of all moneys received by them in that capacity, and were subject to summary proceedings and a special penalty for failure to make settlements at stated periods, as required by law. (1 Ter. L. 387, §§ 12, 14, 17.)—*Held*, that neither the sheriff nor his securities were liable on his bond as sheriff, for his failure to make settlement of his accounts as collector. *Riddick v. Governor*, i. 147.

26. Under the statute of 1835, relating to the collection of the revenue, (R. S. 1835, 535, Art. III,) the sheriff is *ex officio* collector until the 1st January next succeeding the expiration of his term of office; and if such sheriff, on the expiration of his term, fail to qualify as collector, the vacancy in the office may be filled by the Governor. *The State v. Fulkerson*, x. 681. *Fulkerson v. The State*, xiv. 49.

27. Although the commission from the Governor may not state the term for which the officer was appointed, it is not void. That may be shown by parol. *The State v. Fulkerson*, x. 681.

See SUPRA, 23.

C. SETTLEMENT.

28. A county court has power to set aside the settlement of a collector for fraud, at any time during the term. *Price v. Johnson County*, xv. 433.

D. BOND.

29. The defendant was collector of the revenue for the city of Boonville for 1839 and 1840. Bonds, with different sets of securities, were given for each year. The fiscal year commenced on the 3d of May. The register of the city kept a general account with defendant, and on the 3d of May, 1840, he was charged on the books of the register with a default of \$1,437, and this balance was carried over to his account in 1840. The tax books of 1840, placed in defendant's hands and charged to him, amounted to \$2,631 84-100ths. During the year he paid over and was credited with \$3,003. Nothing was said as to the application of the payments, to any particular items of indebtedness, but the payments were credited to his general account. At the end of the fiscal year 1840, there was a general balance struck against defendant of \$1,070 66-100ths. —*Held*, that where an officer is chargeable with the revenue of a specified year, it will be presumed in the absence of all proof to the contrary, that payments made during that year are designed to extinguish the liabilities of such year. But in the absence of all proof of intention, payments made in the year 1840, before the collector was charged with the revenue of that year, must be applied to extinguish the oldest item of indebtedness. *Draffen v. City of Boonville*, viii. 395.

30. Where a county collector serves two successive terms with different sets of securities, and in making payments during his second term applies them, although made out of the revenue of the second term, to the extinguishment of liabilities incurred during his first term, the misappropriation will be binding on the securities in the second bond, if the county treasurer receives the payment in good faith. *The State v. Smith*, xxvi. 226.

31. So also where, although the collector makes no appropriation, the treasurer in good faith applies the payments to the extinguishment of the liabilities of the first term. *Ibid*.

32. Where the law makes the appropriation, in such cases, it will, as between the different sets of securities, appropriate the revenues of each official term to the satisfaction of the liabilities incurred during that term. *Ibid*.

33. It will not be presumed, as a matter of law, that all payments made by the collector into the treasury after the second term commences, are made on account of the revenue of the second term, since he may make payments before he becomes chargeable with any sums received from the revenue of the second term. *Ibid. City of St. Joseph v. Merlatl*, xxvi. 233.

See SUPRA, 25.

e. ACTION AGAINST COLLECTOR.

34. A count in a declaration, on a collector's bond which fails to show that the money which he failed to pay over was collected during his term of office, is bad. *The State v. Grimsley*, xix. 171.

35. In a suit on a collector's bond, plaintiff assigned as a breach, that defendant collected a sum certain which he failed to pay to the plaintiff. The defendant acknowledged the receipt of such sum, but alleged that he had paid it to the plaintiff, and that such sum was all he had collected. The plaintiff in his replication simply denied that such sum was all that was collected by defendant—*Held*, on demurrer, that, as plaintiff did not state what the whole amount was, the replication was bad, as being a departure and as tendering an immaterial issue. *Ibid*.

f. APPEAL.

36. Where a collector has failed to settle his account with the County Court, and the court proceeds to adjust the same as provided in the statute, (R. S. 1835, '151, Art. II) an appeal will not lie. *St. Louis County v. Sparks*, xi. 201.

VI. SCHOOL TAXES.

37. In order that a constable may lawfully levy upon a delinquent's goods and chattels, under the statute relating to the collection of school taxes, (R. S. 1855, 1439, § 2,) he must first demand the payment of the assessment. *Atkison v. Amick*, xxv. 404.

VII. ACTION FOR COLLECTION OF.—EVIDENCE.

38. In an action under the statute, (R. S. 1855, 1528, § 14,) to recover the amount of taxes assessed on defendant's property, he cannot show that there was inequality in the different valuations made by the assessor. *Town of Potosi v. Casey*, xxvii. 372.

See CHANCERY, 98-102; . . . LAWS, 54; . . . ST. LOUIS, XVII.

RIPARIAN RIGHTS.

1. The banks of navigable rivers, in this State, are public highways, and though owned by private individuals, fishermen and navigators are entitled to a temporary use of them, in landing, fastening and repairing their vessels, and exposing their sails and merchandise; but this right is subject to limitations, and will not justify a navigator in landing for several weeks, under pretense of repair-

ing, and building houses, &c., thereby unreasonably obstructing the owner's enjoyment of his property. *O'Fallon v. Daggett*, iv. 343.

2. Where the confirmer of a Spanish concession accepts a survey calling for a street along the bank of the Mississippi river, in an incorporated town, as a boundary, he will not be entitled, as a riparian owner, to land subsequently formed by accretion, although his concession may have called for the river as a boundary. *Smith v. City of St. Louis*, xxi. 36.

ROADS AND HIGHWAYS.

- I. REMONSTRANCE.
- II. PETITION TO VACATE A ROAD.
- III. ROUTE.
- IV. TRESPASS.
- V. COMMISSIONERS' REPORT.
- VI. OBSTRUCTING ROAD.
- VII. PROCEEDINGS AGAINST DELINQUENTS.
- VIII. APPEAL.
- IX. INDICTMENT OF OVERSEER.
- X. PLANK ROADS.

I. REMONSTRANCE.

1. A county court, having received a remonstrance against the location of a county road, and having appointed commissioners to assess damages, a majority of whom assessed damages in favor of the party remonstrating, cannot refuse to receive the report of the commissioners. The award must be complied with, or the case sent to a jury, as provided in the statute of 1847. (Acts 1846-7, 125, § 1.) *St. Francois County v. Peers*, xiv. 537. *Same v. Marks*, xiv. 539.

2. The repeal of § 13, Art I, of the statute relating to roads and highways, (R. S. 1845, 963,) by the act of 1847, (Acts 1846-7, 127,) did not, by implication or otherwise, repeal §§ 16, 17, 18 and 19 of the said act of 1845, though seemingly dependent upon § 13. The only effect was to leave to the discretion of the County Court, the time of receiving and acting upon remonstrances. *Ibid.* *Ibid.*

II. PETITION TO VACATE A ROAD.

3. The proper course to be pursued by one who wishes to have a road closed that has been opened by order of the county, is to proceed, as prescribed in the statute, (R. S. 1855, 1373, §§ 30, 31,) to vacate the same as useless. *Bruce v. Saline County*, xxvi. 262.

III. ROUTE.

4. Under the statute relating to roads and highways, (R. S. 1845, 960,) an overseer, appointed to open a road, cannot deviate from the route designated by the commissioners, against the consent of the owner over whose land the road passes. Where two objects, distant from each other, are marked by the commissioners as designating the route of the road, the presumption is that the road is located on a straight line from one object to the other, if nothing appears to the contrary from their report or other official action. *Butler v. Barr*, xviii. 357.

5. A proceeding of a County Court for turning a road on another's land cannot be sustained under the act of 1845, (R. S. 1845, 964, § 20,) and a new road can be opened upon the land of a party not consenting only as prescribed in the act of 1851, (Acts 1850-1, 275, §§ 7-10.) *Cooper County v. Geyer*, xix. 257.

IV. TRESPASS.

6. County Courts having jurisdiction of the subject matter of opening roads, the order appointing an overseer to open a road is sufficient to protect him from liability as a trespasser on account of irregularity in the proceedings previous to the order. *Butler v. Barr*, xviii. 357.

7. The fact that the damages caused by laying out a road, under the statute, (Acts 1850-1, 274,) may not have been assessed by the commissioners, will not entitle the owner of the land through which the road passes to treat as trespassers those who, under the order of the County Court, and for the purpose of completing the road, enter and cut timber upon the line of the road as located. *Walker v. Likens*, xxiv. 298.

V. COMMISSIONERS' REPORT.

8. The testimony of the commissioners, after they have ceased to be such, is not admissible to vary the legal import of their report. *Butler v. Barr*, xviii. 357.

VI. OBSTRUCTING ROAD.

9. Where, in an action to recover the penalty provided in § 10 of the act relating to roads and highways, (R. S. 1825, 692,) the name of the prosecutor was not inserted in the process, the proceeding was held to be void for want of parties. *Pearce v. Meyers*, iii. 31.

10. An appeal lies from the judgment of a Justice in an action for the recovery of the penalty provided in § 10 of the act relating to roads and highways, (R. S. 1825, 692.) And where the record shows that the appeal was taken on the day of the trial, it is of no importance that the bond was inadvertently dated on the day after. *Ibid.*

11. A party who is prosecuted for obstructing a public way over his own land may show that his property has not been taken for public use according to law. *Golahar v. Gates*, xx. 236.

VII. PROCEEDINGS AGAINST DELINQUENTS.

12. In a suit by a road overseer, it is sufficient that the summons required the defendant "to answer the plaintiff, B. S. P., for the use of the 21st road district, in a plea of debt on an account for failing to work on said road." *Brown v. Pratte*, ix. 331.

13. In the Circuit Court on appeal, after an appearance and trial on the merits before the Justice, it is no ground for dismissing a proceeding, commenced in the name of a road overseer, under the statute, (R. S. 1845, 967, § 46,) against a delinquent hand, that the summons, which is required to issue in the name of the road overseer, "to the use of the road district," simply describes the plaintiff as "road supervisor," without specifying the district, this being specified in the entry of judgment. *Slover v. Muncy*, xxii. 391.

14. The list of delinquents which the road overseer is required to place in the hands of the Justice, (R. S. 1845, 967, § 45,) is for the information and government of the Justice, whose duty it becomes to issue a summons against such delinquent, and is not intended as a written complaint against the party for his information. No written complaint is necessary. *Ibid.*

VIII. APPEAL.

15. An appeal will not lie from the order of a County Court establishing or changing a road, unless some private right be affected by such order. *Overbeck v. Galloway*, x. 364.

16. Nor can a person become a party to such proceeding so as to be entitled to an appeal, unless his private rights are affected thereby. *Ibid.*

17. A party whose land is taken may appeal from the order of the County Court changing a road, and may in certain cases make the county a party to the proceeding. *Cooper County v. Geyer*, xix. 257.

18. *Quære*, whether an appeal will lie from the proceedings of the County Court under the act of 1851 relating to roads and highways, (Acts 1850-1, 274.) *Walker v. Likens*, xxiv. 298.

See SUPRA, 10.

IX. INDICTMENT OF OVERSEER.

19. An indictment under the statute, (R. S. 1845, 968, § 57,) against the overseer of a road district, must distinctly charge that the fork at which he neglected to place a finger board is within his district, and the roads forming the fork must not terminate at the same point. *The State v. Tuley*, xx. 422.

20. An indictment under the statute, (R. S. 1845, 969, § 62,) of a road overseer for failing to keep his road in repair, must state, in terms or substance, that the failure was wilful. *The State v. Levens*, xxii. 469.

X. PLANK ROADS.

21. A corporation, under the provisions of the act 1851, (Acts 1850-1, 260, § 6,) located a plank road over a county road already established and in use—*Held*, that the corporation was liable to the abutters of the road for damages caused to their houses and lands beyond the damages already caused by the construction of the county road. *Williams v. Nat. Bridge Plank Road Co.*, xxi. 580. See JUSTICE OF THE PEACE, 15; . . . LAWS, 24.

See ERROR, 29; . . . LAWS, 73; . . . MANDAMUS, 9, 11.

. S A L E .

I. CONDITIONAL.

II. DELIVERY.

III. POSSESSION BY VENDOR AFTER SALE.

IV. BILL OF SALE.

V. WARRANTY.

VI. FRAUDULENT SALES.

VII. VENDOR'S RIGHT OF RE-SALE.

I. CONDITIONAL.

1. The distinction between a mortgage and conditional sale is that, if the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage; but if the debt is extinguished by the agreement of the parties, or the money advanced was not by way of loan, and the grantor has the privilege of refunding if he pleases by a given time, and thereby entitling himself to a re-conveyance, it is a conditional sale. *Slowey v. McMurray*, xxvii. 113.

2. And if the transaction is a conditional sale, the party seeking a re-conveyance to himself must strictly comply with the conditions imposed upon him. *Ibid.*

II. DELIVERY.

3. An order on the depository of goods sold, given by the vendor to the vendee, constitutes a delivery as between themselves. *Sigerson v. Harker*, xv. 101.

4. Where, in the sale of goods, (a drove of hogs in this instance,) which have been delivered, anything remains to be done by the seller, such as counting, weighing or measuring, the title does not pass, especially when such operation is necessary in order to separate the goods from a larger mass, of which they are a part. And in determining the question as to the purpose of the parties in changing the actual possession, the fact that the price is to be subsequently ascertained by reference to the net weight, and then paid, is proper to go to the jury; but possession is so much of the essence of property, as it is that alone which enables us to enjoy a thing as property, and the natural connection between property and possession, especially in movables, is so strong, that the presumption, arising from the change of actual possession, that it was intended also as a change of the property, is not overcome, as a matter of law, by the fact that the thing bargained for was to be paid for by weight, to be ascertained after the delivery. *Cunningham v. Ashbrook*, xx. 553.

5. Where casks of sugar, lying on the wharf, are purchased by sample, a delivery to the purchaser of the city weigher's certificate and a bill of the price constitute a sufficient delivery. *Glasgow v. Nicholson*, xxv. 29.

6. Where the delivery of a chattel is conditional, the title will not pass until the condition is performed, or the performance thereof is waived. *Dannefelser v. Weigel*, xxvii. 45.

III. POSSESSION BY VENDOR AFTER SALE.

7. The possession of personal property by the vendor after the sale, or by the mortgagor after the mortgage, is not, *per se*, fraudulent as to creditors. It should be left to the jury to determine the character of the transaction. [OVER-
RULES *Rocheblave v. Potter*, i. 561. *Foster v. Wallace*, ii. 231. *Sibly v. Hood*, iii. 290. *King v. Bailey*, vi. 575.] *Shepherd v. Trigg*, vii. 151. *King v. Bailey*, viii. 332. *Milburn v. Waugh*, xi. 369. But see R. S. 1855, 804, §§ 8, 10.

IV. BILL OF SALE.

8. An instrument in writing, which says, "I do give unto J. P. a bill of sale of seven negroes," (naming them,) is a good bill of sale, as, between the parties to it. The property in the negroes passed by the delivery of the instrument. *Potter v. Gratiot*, i. 368.

9. A bill of sale, stating that A. "sold and passed" to B. a quantity of hemp, will pass the title, notwithstanding A. was to perform certain labor on the hemp. *Swartz v. Chappell*, xix. 304.

See EVIDENCE, 46-48.

V. WARRANTY

10. Upon a sale, with warranty, of a lot of pork barrels, the vendee cannot select such as he may suppose corresponds with the warranty, and return the

balance. The rescission of the contract must be entire, if rescinded at all. But if the articles sold are not all to be delivered at the same time, the receiving of a portion, as they are delivered, which answer the warranty, does not oblige the vendee to accept such as are deficient in quality, especially if the portion received has been so appropriated as to render a re-delivery inconvenient. *Sigerson v. Harker*, xv. 101.

See PRACTICE, 129 ; . . . WARRANTY.

VI. FRAUDULENT SALES.

11. To constitute a sale fraudulent in fact, as against creditors, it must be made with intent, on the part of the vendor, to defraud, delay or hinder creditors. *Sibly v. Hood*, iii. 290.

12. To constitute a sale fraudulent in fact, when a full consideration is paid, it must be made with the intent, both on the part of the vendor and vendee, to defraud, hinder or delay creditors, and such intent must be shown by the party attempting to impeach the sale. *Ibid.*

13. A sale or mortgage to secure a contingent liability is not fraudulent, but to perfect the consideration the contingency must arise and make certain the liability. *Ibid.*

14. An averment, in a declaration in an action on the case for fraudulent representations, made by the vendor in a sale of property, that the "representations were false and fraudulent," is a substantial charge that the vendor knew them to be untrue, and is sufficient. *M'GIRK, J., dis. Buford v. Caldwell*, iii. 477.

15. Where the parties to a sale are equally mistaken and have equal knowledge, or means of knowledge, there is no remedy for either in law or equity. *Per WASH, J. Ibid.*

16. Where a purchaser seeks relief in chancery, on the ground that a slave bought by him was, at the time of the purchase, diseased, and that he subsequently died, it must appear in evidence that the disease of which the slave died was that which he had at the time of sale, and that the purchaser did not then know of it. *Stewart v. Dugin*, iv. 245.

17. Where slaves are purchased in good faith, and for a valuable consideration, of one who has possession of them and acts for the owner under a power of attorney, the owner cannot avoid the sale on the ground that the power was fraudulently obtained from him by the agent. *Lawless v. Guelbreth*, viii. 139.

18. D. having another wife living, imposed himself upon the plaintiff, and induced her to marry him. After the marriage, he took possession of personal property belonging to her, and sold it to the defendant, who bought in good faith—*Held*, that the title passed. *Depew v. Robards*, xvii. 580.

19. A fraudulent sale set aside. *Wells v. Thomas*, x. 237.

20. The title of a *bona fide* purchaser of a slave from an administrator for a valuable consideration, and without notice of any fraud on the part of the administrator, is good. *Pipkin v. Casey*, xiii. 347.

21. A party, knowing his insolvency and inability to pay, purchased goods on credit, for which he afterwards failed to pay—*Held*, that he was not guilty of such deceit as to avoid the sale. *Bidault v. Wales*, xix. 36.

22. Collusion or contrivance to enable the purchaser at a judicial sale to obtain the land for less than its real value, is cause for setting the sale aside. *Neal v. Stone*, xx. 294. *Stewart v. Nelson*, xxv. 309.

23. So it was agreed, at an auction sale of land for partition, between A. and B., both bidders, that one should desist from bidding that the other should purchase the land, and that it should be divided between them. One desisted, and it was sold to the other at about one-half its value. The sale was set aside. *Wooton v. Hinkle*, xx. 290. *Hook v. Turner*, xxii. 333.

24. To avoid a sale of goods on credit the purchaser, when he buys, must intend never to pay for them; it is not sufficient that he did not intend to pay for them at the time agreed upon; and this question must be decided by the jury. *Bidault v. Wales*, xx. 546.

25. A sale of goods on credit cannot be avoided by the seller when the rights of third persons have intervened. But this exception does not include the general creditors of the purchaser who seize the property by attachment or execution, or take it as security for a debt before contracted. It may exclude a factor's lien, even for a general balance. *Ibid*.

26. If the vendor of a horse is aware, at the time of a sale, of the existence of a latent defect, unknown to the vendee, of such a character that the vendee would not have made the purchase had he known it, and such as would have ordinarily escaped the observation of men engaged in buying horses, and he allows the vendee to purchase without disclosing the defect, he is guilty of a fraudulent concealment, and is liable in damages. *McAdams v. Cates*, xxiv. 223.

27. And such defect may be set up as a defense to an action on a note given for the price of the article sold. *Barron v. Alexander*, xxvii. 530. See DEMAND, 9.



VII. VENDOR'S RIGHT OF RE-SALE.

28. Where the vendee refuses to take the goods which he has purchased, the vendor may sell them without giving notice to the vendee; and if he uses reasonable diligence about such sale, he may recover the difference between the net proceeds of such sale, and the price agreed to be paid by the original vendee. *Ingram v. Matthien*, iii. 209.

See ADMINISTRATION, XIII; . . . ATTACHMENT, XIV; . . . BOATS AND VESSELS, IX; DEED OF TRUST, V; . . . EXECUTION, X; . . . MORTGAGE, IX; PARTITION, 24-26; . . . REVENUE, III; . . . SCHOOL LANDS, I.

SALVAGE.

1. Where a steamboat was parted from her moorings by the ice, in the day time, while no one was on board, and the plaintiff seized the broken hawser, and succeeded in securing and delivering her to the owner, she being in a dangerous situation from the breaking up of the ice and other boats, it was *held*, that these facts did not entitle the plaintiff to salvage under the statute, (R. S. 1845, 984, § 1.) *Collard v. Eddy*, xvii. 354.

SCHOOLS.

- I. ORGANIZATION.
- II. LIABILITY OF TRUSTEES.
- III. SCHOOL FUNDS.

I. ORGANIZATION.

1. In order that a neighborhood, situated in two or more townships, may be formed into a separate school district under the statute, (Acts 1852-3, 160, § 8,) a majority of the inhabitants of the proposed district should unite in the application to the school commissioner. *Sayre v. Tompkins*, xxiii. 443.

II. LIABILITY OF TRUSTEES.

2. The trustees of a school district are not personally liable on a note executed by their predecessors in office, in which they "promise in our name of office to pay" a sum named to a teacher for services. *Rogers v. Carver*, xxi. 517.

3. The trustees of a school district, organized under the act of March 27, 1845, cannot be sued as a corporation for a debt incurred by them for the building of a school-house; nor would the property held by them, as such trustees, be liable to execution. *Allen v. Trustees of School District*, xxiii. 418.

4. The official character of school trustees may be proved by their acts and conduct as such; the oath of office filed by them with the Clerk of the County Court, and their official bonds, are competent to prove their official character. *Eads v. Wooldridge*, xxvii. 251.

III. SCHOOL FUNDS.

5. As to the priority of lien under § 15, Art. VI, of the act of February 9, 1839, relating to common schools, (Acts 1838-9, 147.) *Cole County v. Angney*, xii. 132.

6. A County Court having loaned township school funds at ten per cent., has no right, upon the application of the inhabitants of the township, to reduce the rate of interest. And the Circuit Court will, by *mandamus*, on the application of the school commissioner, compel the County Court to collect the whole amount. *Veal v. Chariton County Court*, xv. 412.

7. Nor have the inhabitants of a school township for the time being any right to dispose of, or in any way impair the township school fund. *Ibid.*

SCHOOL LANDS.

I. SALE OF.

II. INDICTMENT FOR TRESPASS ON.

I. SALE OF.

1. The act of February 25th, 1835, providing for the sale of township school lands, in Saline and other counties, (R. S. 1835, 571,) is not inconsistent with the first section of the act of March 19th, 1835, relating to "schools and school lands." (R. S. 1835, 561.) The latter is the general law, the former local and confined to the counties therein named. *Brown v. Crawford County*, viii. 640.

2. A purchaser of school lands cannot be relieved in equity against the payment of a bond given for the purchase money, on the ground that a majority of the householders of the township did not petition the County Court for a sale of the sixteenth section, nor because sixty days notice of the sale was not given. *Bogarth v. Caldwell County*, ix. 355.

3. An appeal will not lie to the Circuit Court, from an order of the County Court, vacating and setting aside a sale of a sixteenth section made by the sheriff under a previous order of the County Court. *Wilson v. School Township, No. 6*, xxiii. 416.

II. INDICTMENT FOR TRESPASS ON.

4. A prosecutor is not necessary in an indictment for a trespass upon school lands. A prosecutor is only necessary in cases of trespass upon private property, and not in cases of trespass upon property of the State, or of the counties. *The State v. Roberts*, xi. 510.

5. An indictment under § 30 of the Act relating to school lands, (R. S. 1845, 994,) which charges the defendant with committing "waste, trespass and other injury," &c., "by cutting down and carrying away timber," &c., is not bad for duplicity. *The State v. Myers*, xx. 409.

See ACTION, 21;...EJECTMENT, 34;...ESTOPPEL, 15;...LAWS, 48, 75;
PUBLIC LANDS, 132-145.

SCIRE FACIAS.

- I. TO REVIVE JUDGMENT.
- II. ON BAIL BOND.
- III. RECOGNIZANCE ON APPEAL.
- IV. WHEN IT IS A CONTINUATION OF AN OLD ACTION.
- V. PROCEEDINGS.
 - a. PLEADING.
 - b. CONTINUANCE.
 - c. JUDGMENT.

I. TO REVIVE JUDGMENT.

1. Where the law forbids the issuing of an execution against the lands of a deceased person in less than eighteen months after administration granted, there can arise, during that time, no presumption of payment, and no *scire facias*, therefore, is necessary to revive the judgment. *Finley v. Caldwell*, i. 512.

2. The statute of 13 Edward I, giving a *scire facias* to revive a judgment in a personal action, is in force in this State. *Garner v. Hays*, iii. 436.

3. On a *scire facias* to revive a judgment, no declaration is necessary, and it may issue on a judgment for costs pending a motion for their re-taxation. *Ibid*.

4. A Justice has no power to issue a *scire facias* on the judgment of another Justice, to show cause why execution should not issue. *Wilson v. Tiernan*, iii. 577.

5. A *scire facias* is not necessary to revive a judgment of the County Court. It is not a court of common law jurisdiction. *Caldwell v. Lockridge*, ix. 358.

6. To a *scire facias* to revive a judgment for a foreclosure, where the mortgagor has deceased, his personal representative is a sufficient party, and the heirs need not be joined. *Riley v. McCord*, xxi. 285.

II. ON BAIL BOND.

7. A *scire facias* on a bail bond, should be brought in the name of the sheriff, unless the bond has been assigned by the sheriff to the plaintiff. *Brown v. Benton*, i. 227. *Priest v. Whitelow*, i. 259.

8. A *scire facias* lies on a bail bond, under the Act of July 3rd, 1807, "establishing courts of justice and regulating judicial proceedings." *Howel v. March*, i. 182. *Benton v. Brown*, i. 393.

9. The prayer of a *scire facias* on a bail bond, should be for execution of the specific sum in the bond, and not for the damages in the first suit. *Howel v. March*, i. 182.

10. But though the prayer be wrong, it is a matter of form, and is good on general demurrer. *Barton v. Vanzant* (re-hearing), i. 192. *Howel v. March*, (re-hearing), i. 193.

III. RECOGNIZANCE ON APPEAL.

11. A recognizance in an appeal, given in the Circuit Court, is a record of that court, and a subject of its jurisdiction; and a *scire facias* upon it, as a record of that court, is well brought. *Barton v. Vanzant*, i. 190.

12. Such *scire facias* may be brought against the security alone, without joining the principal, the case being comprehended in the terms of the statute, which provides "that, in all cases of joint obligations and assumptions, suits may be brought and prosecuted in the same manner as if the same were joint and several." *Ibid.*

IV. WHEN IT IS A CONTINUATION OF AN OLD ACTION.

13. A proceeding by *scire facias* upon a forfeited recognizance, is not a civil action, within the meaning of the new code, but a mere continuation of an existing proceeding. *The State v. Randolph*, xxii. 474.

V. PROCEEDINGS.

a. PLEADING.

14. Nothing can be pleaded to a *scire facias* on a judgment, which might have been pleaded to the original action. *Watkins v. The State*, vii. 334.

See SUPRA, 3.

b. CONTINUANCE.

15. A *scire facias* is a suit, and should be continued at the return term, under the provision of the statute of 1835, (R. S. 1835, 462, § 2.) *Milsap v. Wildman*, v. 425.

c. JUDGMENT.

16. On a *scire facias*, the court will give judgment according to law, and not according to the prayer of the plaintiff. Therefore, where the writ of *scire facias* required the defendants to show cause why the same should not be levied of "their respective bodies, lands and chattels," instead of "their respective goods and chattels, lands and tenements," the error was *held*, not to vitiate the writ, but considered as a mere clerical blunder. *Snowden v. The State*, viii. 483.

See ACTION, VII, VIII; . . . CRIMINAL LAW, XIX; . . . MECHANICS' LIEN, 18-23; . . . MORTGAGE, VIII.

SEAL.

1. To constitute a sealed instrument, under the statute, it must be expressed on the face thereof, to be sealed. *Cartmill v. Hopkins*, ii. 220. *Boynton v. Reynolds*, iii. 79. *Grimsley v. Riley*, v. 280. *Walker v. Keile*, viii. 301.

2. And it is not sufficient that the signer affixes a scroll to his name, by way of seal, although it contain within it the word "seal." *Glasscock v. Glasscock*, viii. 577.

3. An instrument which our laws regard as sealed, though executed in a State in which the law would not so regard it, is, so far as the remedy is concerned, to be regarded as sealed, when sued on in this State. *Dorsey v. Hardesty*, ix. 157.

See CONVEYANCES, 3-7; . . . CORPORATION, IV; . . . COUNTY, II.

SECRETARY OF STATE.

1. The amendment to the State constitution, ratified in 1851, making the Secretary of State elective, (Acts 1850-1, 47, §§ 1, 2,) did not create a vacancy in that office. The incumbent continued to hold until his successor was elected, pursuant to the law passed under that amendment; but after his successor was thus elected, he ceased to be the officer, although the term for which he was appointed, under the original constitution, had not expired. *The State v. Ewing*, xvii. 515.

SECURITIES.

I. LIABILITY OF SURETY.

II. DISCHARGE OF SURETY.

a. BY DELAY TO SUE AFTER NOTICE.

b. OTHER CASES.

III. SURETY'S REMEDY AGAINST PRINCIPAL.

IV. SURETY'S DEFENSE WHEN SUED.

V. SUBROGATION AND SUBSTITUTION.

VI. CO-SURETIES—CONTRIBUTION—DISCHARGE.

VII. EVIDENCE.

I. LIABILITY OF SURETY.

1. G. was V.'s security in a debt, on which judgment had been obtained against both, for ninety-one dollars and thirty-four cents. To indemnify G. against his liability, V. assigned to him sundry notes against solvent parties, amounting to one hundred and fifty dollars, all of which, G. transferred to the holder of the judgment, to discharge and satisfy it—*Held*, that it was his right to do so, and that V. could not recover of him the difference in value between the notes assigned and the judgment. *Vest v. Green*, iii. 219.

2. The undertaking of a surety is to be construed strictly. *Per Scott, J. Blair v. Perpetual Ins. Co.*, x. 559.

3. A surety of one as agent of a corporation, is limited to such acts as the corporation is authorized to require of its agent. *Ibid*.

4. So he is not bound for an embezzlement by the agent, if the funds of the corporation, while such agent was transacting banking business, in which the corporation had no right to engage. *Ibid*.

5. The liability of a surety, and his right to indemnity, must be determined by the laws in force at the date of his undertaking. *Dobyns v. McGovern*, xv. 662.

6. A. executed a promissory note to B. and C., who indorsed and transferred it to D. A., at the same time, executed a deed of trust to B. and C., who were accommodation indorsers to secure them against liability. The trustee under the deed, sold the property, and the proceeds were more than sufficient to pay the note, but they were not applied to its payment. *Held*, that whether D. had knowledge of the proceedings or not, the liability of B. and C. to D., was not thereby discharged. *Fischer v. Meyer*, xxiv. 90.

See CONSTABLE, 15-21; . . . CRIMINAL LAW, 261 . . . TRESPASS, 14.

II. DISCHARGE OF SURETY.

a. BY DELAY TO SUE AFTER NOTICE.

7. Under the statute, (R. S. 1835, 574, § 1,) a verbal notice by the security to the person having the right of action, to commence suit against the principal, is sufficient. *Bolton v. Lundy*, vi. 46.

8. But under the statute, (R. S. 1845, 998, § 1,) such notice should be in writing, and the service thereof personal, or by leaving a copy at his usual place of residence, with some white person of the family over the age of fifteen years. *Sapington v. Jeffries*, xv. 628. [So under the R. S. 1855, 1454, § 1.]

9. Under the statute, (R. S. 1845, 998, § 1,) a notice, given by a surety on a note which is overdue, to commence suit against the principal, or that he would no longer stand security, is sufficient, if its object could not have been misunderstood by the creditor, though it does not contain a description of the note. *Routon v. Lacy*, xvii. 399.

10. Such a notice by one surety, though it may discharge him, will not prevent the creditor from recovering in equity, against a co-surety who has not given notice, his proportion of the debt. *Ibid*.

11. A notice given by a surety to the holder of a promissory note, in these words — "Sir: You are hereby notified that I will not stand good as security any longer on the note you hold against Wm. Upton and myself as security," is not sufficient, under the statute, (R. S. 1845, 998, § 1.) *Lockridge v. Upton*, xxiv. 184.

12. A notice given under the statute, (R. S. 1845, 998, § 1,) by a security in a note, to the person having the right of action thereon, to commence suit forthwith against the other parties to the note, naming them, is sufficient, and evidence may be given of its contents, although no notice to produce it was given. *Christy v. Horne*, xxiv. 242.

13. Under the statute relating to "securities," (R. S. 1845, 998, §§ 1, 2,) a surety cannot exonerate himself from liability by notifying the creditor, after the death of the principal debtor, to present the demand for allowance against his estate, and the failure of the creditor to do so within thirty days. A case where the principal is dead is not within the meaning of the statute. *Hickam v. Hollingsworth*, xvii. 475.

14. Under the statute, a surety will not be discharged by the fact that the creditor, whom he has notified to commence suit against all the parties liable, does not join him in the suit; nor by the fact that a co-security, who is a non-resident of the State, is not proceeded against. *Perry v. Barret*, xviii. 140.

15. The indorser of a negotiable promissory note is not a security within the meaning of the statute relating to securities, and cannot discharge himself from liability by notice. *Clark v. Barrett*, xix. 39.

16. Nor can he, after payment of a judgment recovered against him and the maker, obtain judgment against a prior indorser, upon motion, as provided by statute. (R. S. 1845, 1000, § 9.) *Devinney v. Lay*, xix. 646.

17. Where the security and the payee, in a note within the jurisdiction of a Justice, reside in the same county, and the principal debtor resides in another county, the payee, on being served with notice by the security to commence suit, (R. S. 1835, 574, § 1,) has his election to sue either the principal or the security, and is not bound to go to a distant county to sue the principal. *TOMPKINS, J., dis. Hughes v. Gordon*, vii. 297.

18. A surety in a promissory note, who gives notice to the payee to commence suit against the principal, who is a non-resident, is not discharged from liability by a failure to commence suit within thirty days after such notice. *Phillips v. Riley*, xxvii. 386.

b. OTHER CASES.

19. The omission of the State to sue an official bond until several years after the officer's default, will not discharge his securities. Laches are not imputed to the State. *Parks v. The State*, vii. 194.

20. Mere negligence on the part of the payee of a note, in not suing, will not discharge the security; but where judgment is obtained and a lien created by delivery of the execution to the sheriff, and that lien is voluntarily discharged by the creditor, that will discharge the security. *Ferguson v. Turner*, vii. 497.

21. A mere naked agreement by the creditor to give the principal debtor time,

will not discharge the security. Such agreement, to discharge the security, must be based upon sufficient consideration, and be binding in law upon the creditor. *Nichols v. Douglass*, viii. 49.

22. The recommendation by the payee of a note to the principal to carry his property to a better market, out of the State, sell it and return and pay his debts, and, if unable to pay all, to pay *pro rata*, is not a fraud upon, and will not operate as a release to, the securities in the note. *Hawkins v. Ridenhour*, xiii. 125.

23. The failure of the County Court to take a mortgage in fee on real estate, free from all liens and incumbrances, to secure the payment of school money loaned, as required by statute, (Acts 1838-9, 118, § 11,) does not discharge the surety. *Marion County v. Moffett*, xv. 604.

24. The omission to disclose the fact that the principal had agreed to pay usurious interest, or that usurious interest had been included in the note, does not discharge the surety. *Samuel v. Withers*, xvi. 532.

25. A surety is entitled to the benefit of all the securities for the debt taken by the creditor of the debtor, and discharged from his liability to the extent the creditor parts with such securities. Thus, where it was provided in a building contract that a certain per cent. should be reserved until its completion, and the employer, with a knowledge of existing liens on the building for labor and materials, paid the contractor in full, the surety was thereby discharged to the extent of the reservation provided for. *Taylor v. Jeter*, xxiii. 244.

26. The voluntary dismissal of an attachment suit, commenced by an indorsee of a promissory note, at the request of a surety, against the principal, in which an amount of property more than sufficient to satisfy the debt was attached, will discharge the surety. *Bank of Missouri v. Matson*, xxiv. 333. *Same case*, xxvi. 243.

27. A covenant not to sue one of several sureties jointly liable, will not discharge the others. *City of Carondelet v. Desnoyer*, xxvii. 36.

28. The release of the principal in a judgment debt discharges the surety. Thus, where the judgment creditor gave the sole heir of an estate a covenant not to enforce it against the estate, except as to certain parcels of land, and reserved the right to pursue the surety thereon, it was *held*, in a suit by the surety against the judgment creditor and the administrator of the estate, the judgment creditor having procured the allowance of the judgment against the estate, and the placing of it in the fourth class, that the covenant operated as a release, and that the judgment could not be allowed against the estate so as to protect it from the claim of the surety for the amount paid by him on the judgment debt, or upon the official bond upon which the judgment was founded. *Hempstead v Hempstead*, xxvii. 187.

29. The relation of maker and indorser of a promissory note so far continues, after the recovery of judgment against them at the suit of the indorsee, that an agreement with the maker to stay execution as to him for a specified period, will operate a discharge of the indorser, and entitle him to a perpetual stay of execution. *Smith v. Rice*, xxvii. 505.

See SUPRA, 6.

III. SURETY'S REMEDY AGAINST PRINCIPAL.

30. Where an attachment bond is given by two, as principal and surety, and the surety takes a bond of indemnity from a stranger, the latter having indemnified the surety, may recover the amount of the principal in said bond, although the surety stated, at the time he assigned his recourse against the principal, that he did not think he had any such recourse. *Labeaume v. Sweeney*, xvii. 153.

31. Where two executors or administrators unite in one bond, they are jointly and severally liable as principals to indemnify the surety who has been subjected to the payment of money by the default of one of them. *Overton v. Woodson*, xvii. 453.

32. A boat was seized by attachment in a suit against the owner, and S., the master of the boat, who had no other interest in it, executed a bond, with L. as surety, conditioned for the forthcoming of the boat. The boat was subsequently sold at private sale, and C. became part owner. L. was about to deliver up the boat to the sheriff, when C. gave him a bond of indemnity to secure him from liability on the delivery bond, and to free the boat from detention. C. afterwards paid the indemnity to L., and took an assignment of his recourse against S. Suit was brought by C., in the name of L., against S., to recover the amount thus paid—*Held*, that he could not recover. *Labeaume v. Sweeney*, xxi. 166.

33. A surety on a note given to secure money bet in this State on the Presidential election, who knew, at the time of signing, the consideration for which the note was given, and who is compelled by legal process in a foreign jurisdiction to pay the same, cannot recover the amount so paid of his principal. *Harley v. Stapleton*, xxiv. 248.

IV. SURETY'S DEFENSE WHEN SUED.

34. In a suit against the sureties on a note given for the price of a slave, a breach of warranty of soundness may be set up by them in defense, though the warranty was to the principal alone, who is not joined. *Scroggin v. Holland*, xvi. 419.

35. A surety may contract as a "principal," and by so doing will renounce the right of setting up a defense arising out of the relation of principal and surety. *Picot v. Signiago*, xxii. 587.

See USURY, 1.

V. SUBROGATION AND SUBSTITUTION.

36. The security may recover at law for the money he has been compelled to pay for his principal; but he can be subrogated to the rights and liens of the creditor in respect to such debt only in chancery. *Miller v. Woodward*, viii. 169.

37. And in chancery he will be subrogated to all such securities, rights and liens. *Miller v. Woodward*, viii. 169. *Cole County v. Angney*, xii. 132. *Crumpp v. McMurtry*, viii. 408.

38. But, until the debt is paid, the creditor has a lien upon and will hold all the securities placed in the hands of the surety for his protection by the principal. *Haven v. Foley*, xviii. 136.

39. A. sold a parcel of land to B. and took his notes for the purchase money, payable in equal instalments of \$1,920, in one, two and three years, retaining for security a vendor's lien upon the land. The second note not being paid at maturity, was sued on, and personal property attached to the value of \$1,000, which was released on receiving from B. a bond with securities for \$1,000, as additional security for the note sued on. Judgment was taken on this note for the full amount of it. At a subsequent term judgment was obtained on the third note. Executions were issued on both judgments, and the land conveyed by A. to B. levied upon and sold under them, and the proceeds applied, first, to the satisfaction of the last judgment, and the balance on the first judgment, and leaving more than \$1,000 due thereon—*Held*, that the securities in the bond had no right to be substituted in the place of the creditor in respect of his lien on the land under the first judgment; that the bond was an additional and not a collateral security, and that the doctrine of substitution did not apply to the case. *Crump v. McMurtry*, viii. 408.

40. The payee of a note is entitled to the benefit of any counter security given for the indemnity of an indorser, as is also a party to whom the debt evidenced by the note is transferred, with consent of such indorser. Thus, where the payee of a note, indorsed by one who holds counter security, accepts the note of a third party and transfers to him, with consent of the indorser, the debt evidenced by the original note, this substituted creditor will be entitled to the benefit of the counter security, though the agreement may have been that the original note was to be delivered to the indorser; and equity will protect this security to such substituted creditor against a subsequent incumbrancer, though the note was not assigned to him. *Haven v. Foley*, xix. 632.

41. A. purchased real estate, paid a portion of the purchase money, and gave his bond, with B. as security, for the balance. C. subsequently purchased at sheriff's sale all of A.'s interest in the land. B. was compelled to pay the bond signed by him as surety—*Held*, that he was entitled to be subrogated to the right of the original owners, and might subject the land in the hands of C. to the payment to himself of the money so paid by him. *Smith v. Schneider*, xxiii. 447.

See BOATS AND VESSELS, 35; . . . INSURANCE, 59.

VI. CO-SURETIES—CONTRIBUTION—DISCHARGE.

42. Where a bond was executed by A., B., C. and D., and A. was a principal in the bond and D. was a surety, and D. supposed, at the time of executing the bond, that B. was also a principal, and while the bond was in possession of A. and B., and before its delivery, the name of D. was erased, but it did not appear by whom or in what manner, and A. and C. having become insolvent, B. paid the whole amount of the bond—*Held*, that B. could not maintain a bill in equity against D. for contribution. *Price v. Edwards*, xi. 524.

43. Where a debtor, on the eve of insolvency, conveyed property in trust by

different instruments to indemnify certain securities against the payment of the debts for which they were severally bound, and the property proved insufficient to secure them fully, a court of equity will leave them to bear the loss proportionately, unless there is a clearly expressed intention to give a preference to one over another. *Hayden v. Cornelius*, xii. 321.

44. Where property is conveyed in trust by the principal to indemnify a surety, (who subsequently pays the debt,) which is sold under the direction of the surety for a sum sufficient to satisfy the claim, his co-surety is not liable in an action for contribution, although the money had not been actually collected in the sale. *Chilton v. Chapman*, xiii. 470.

45. A surety may use the name of his principal to enforce contribution from a co-surety. *McCourtney v. Sloan*, xv. 95.

46. A judgment recovered does not extinguish the mutual relations of principal and surety, or of co-sureties. A judgment was recovered upon a note on which there were two co-sureties. The assignee of the judgment refused to have one-half of the judgment debt satisfied from the property of one co-surety, and thus lost his lien upon his property, which went to satisfy other judgments, its owner being otherwise insolvent—*Held*, that the other co-surety was discharged to the extent of one-half of the judgment debt. *Rice v. Morton*, xix. 263.

47. A release of one of several sureties by the creditor will discharge the others only so far as the released surety would be bound to make contribution if the other sureties or any of them should pay the entire debt. *Dodd v. Winn*, xxvii. 501.

48. A., the payee of a promissory note, obtained judgment thereon against B., one of five sureties. An execution under said judgment was levied on property belonging to B., sufficient to satisfy the debt. A. ordered the execution to be returned unsatisfied. A. subsequently commenced suit against C., another of the sureties—*Held*, that if all the sureties were solvent, A. could recover of C. only four-fifths of the debt; but if all the other sureties were insolvent, he could recover only one-half the debt of C. *Ibid*.

49. If one of several co-sureties is insolvent, the other co-sureties will be bound to make contribution as among themselves, as if the insolvent surety had not been surety at all. *Ibid*.

See SUPRA, 10;....BILLS EXCHANGE AND PROM. NOTES, 26, 27;....CONTRIBUTION.

VII. EVIDENCE.

50. The fact that a party was a security in a bond may be shown by any person having knowledge of the fact, as well as by the subscribing witness. *Foster v. Wallace*, ii. 231.

51. The settlements made by an officer with the court are not conclusive against his securities, but may be explained or disproved by them. *Nolley v. Callaway County Court*, xi. 447. *The State v. Smith*, xxvi. 226. See EVIDENCE, 80, 81, 106–108;....WITNESS, 91–94.

See ADMINISTRATION, 38–50;....BILLS EXCHANGE AND PROM. NOTES, VII;....BOND, V.

SEDUCTION.

1. In an action on the case for seducing and getting with child the daughter of plaintiff, whereby he lost her services, &c., evidence of the daughter's general bad character for chastity is admissible in mitigation of damages. *Carder v. Forehand*, i. 704.

2. A parent may maintain an action for the seduction of a daughter over the age of twenty-one years, where the slightest actual service is rendered by the daughter. *Vossel v. Cole*, x. 634.

3. The connivance of the parent to the seduction of his daughter will bar an action therefor by him. *Ibid.*

4. In a suit by a father for the seduction of his daughter, the defendant will not be permitted to prove that the plaintiff had cast imputations upon the virtue of his own mother, by giving evidence in a former suit that she had had an illegitimate child before her marriage with plaintiff's father. *Grider v. Dent*, xxii. 490.

See ACTION, 12; . . . HUSBAND AND WIFE, 7.

SET-OFF.

I. ALLOWANCE.

- a. WHEN ALLOWED.
- b. WHEN NOT ALLOWED.
- c. SPECIAL CASES.

II. AS AFFECTED BY THE PARTIES.

III. CLAIMS FALLING DUE AFTER ACTION BROUGHT.

IV. NOTICE, PLEADING AND JUDGMENT.

I. ALLOWANCE.

a. WHEN ALLOWED.

1. A debt due to a surviving partner may be set off against a debt due from him individually, and so *vice versa*. (See R. S. 1825, 215, § 4—738, § 1.) *TOMPKINS, J., dis. Cowden v. Elliot*, ii. 60.

2. Where, in a contract of sale, it was provided that, if the property sold proved otherwise than as warranted, the vendor should refund a given sum, the amount thus provided to be re-paid, on the condition named, is liquidated damages, and may be enforced as a set-off in the Circuit Court on appeal, the same as before the Justice's Court. (See R. S. 1825, 478, § 16.) *Myers v. Hay*, iii. 98.

3. A note transferred by delivery, for value, is the subject of set-off, although not assigned in writing. *Frazier v. Gibson*, vii. 271.

4. Where general assumpsit will lie on a contract, the debt evidenced thereby may be pleaded as a set-off. *Austin v. Feland*, viii. 309.

5. A set-off may be pleaded before a Justice after a judgment by default is set aside. *Robinett v. Nunn*, ix. 244.

6. As between the original parties to a bond or note, a set-off is allowed, although the bond or note be payable "without defalcation or discount." *Baker v. Brown*, x. 396.

7. If such an instrument be fraudulently assigned, the defendant may plead such fraudulent assignment, and set off a demand against the payee. *Ibid. Martindale v. Hudson*, xxv. 422.

8. Where a note was left with the plaintiff's intestate by the defendant, for collection, and the former converted it to his own use, it was held, that the amount of the note was not unliquidated damages, and was, consequently, the subject of a set-off. *Gunn v. Todd*, xxi. 303.

9. The subject matter of an original suit may be used as a set-off by the plaintiff in that suit during its pendency, when he is sued by his adversary. If it is a final judgment, it is a set-off as a judgment. *Ibid.*

b. WHEN NOT ALLOWED.

10. In an action by the assignee against the maker of a note, the defendant could not, under a plea of payment to the assignee, give evidence of an outstanding debt against the assignor by way of set-off. (See 1 Ter. L. 54, § 1.) *Jones, J., dis. Barton v. Wilkins*, i. 74.

11. A debt not due is not a subject of set-off. *Scogin v. Hudspeth*, iii. 123.

12. Nor is a debt payable in work. *Prather v. McEvoy*, vii. 598.

13. In an action by a common carrier for freight money, the defendant cannot set-off a claim for goods not delivered. *Johnson v. Strader*, iii. 359.

14. A set-off cannot be proved under a plea of payment. *Oldham v. Henderson*, iv. 295.

15. A set-off is not allowable against a note expressed, on the face of it, to be "payable without defalcation." (R. S. 1835, 105, § 4.) *Collins v. Waddle*, iv. 452. [See R. S. 1855, 322, § 3.]

16. Where a set-off before a Justice exceeds his jurisdiction, the excess may be waived; but if not waived, the set-off should be treated as a nullity, both before the Justice and in the appellate court. *Robinett v. Nunn*, ix. 244.

17. And a set-off before a Justice is not allowable on an account exceeding his jurisdiction, although by crediting the plaintiff's demand upon it the claim is reduced within the limit of the jurisdiction. *Almeida v. Sigerson*, xx. 497.

18. Where the parties having running accounts together, one doing work and the other making payments on account thereof, such payments cannot be set off against an action brought for work done at a time subsequent to such payments. *Pond v. Butler*, x. 448.

19. Under the new code, (Acts 1848-9, 82, § 12,) a set-off is not admissible where the claim of either party is for unliquidated damages. *Johnson v. Jones*,

xvi. 494. *Mahan v. Ross*, xviii. 121. *Pratt v. Menkens*, xviii. 158. *Brake v. Corning*, xix. 125.

20. In an action on a promissory note, the defendants cannot set-off damages alleged to have been sustained by fraudulent practices of the plaintiffs, in a transaction which does not appear to have any connection with the note in suit. *Pratt v. Menkens*, xviii. 158.

See ADMINISTRATION. 44.

C. SPECIAL CASES.

21. If a creditor on the eve of his bankruptcy fraudulently delivers goods to one of his creditors, the assignee may disaffirm the contract and recover the value of the goods in trover; but if he brings assumpsit he affirms the contract, and then the creditor may set-off his debt. *Benoist v. Darby*, xii. 196.

22. A chose in action, which is assignable, cannot be set-off by a person to whom it is transferred, if he holds it merely as trustee. *McDonald v. Harrison*, xii. 447.

23. A. sold B. a horse, and received in exchange a yoke of oxen, and was to receive ten dollars in cash. A warranted the horse to be sound, and agreed to take him back if he proved unsound. The horse proving unsound, B. offered to return him, and demanded the return of his oxen—*Held*, in an action by A. against B. for the ten dollars, that B. might set-off and recover the value of the oxen. *Smith v. Steinkamper*, xvi. 150.

24. Where notes sued on are proved to have been given upon a settlement, and the defendant sets up a claim which accrued prior thereto, he must show that it was not included in the settlement. If the disputed claim was discussed at the time of the settlement, it will be presumed that it was embraced therein, unless it clearly appears that the parties agreed to leave it open. *Perry v. Roberts*, xvii. 36.

25. The assignees of A., an insolvent, brought an action against B., on a note given to A. B. pleaded as a set-off a sum paid by him, after the assignment, on a note given by A., and protested before the assignment, on which B. was indorser—*Held*, that the set-off should be allowed. *Morrow v. Bright*, xx. 298.

II. AS AFFECTED BY THE PARTIES.

26. To an action on a joint note, payable to the plaintiffs as administrators of A., the defendants pleaded in set-off their portions of the estate of A., which the plaintiffs had been ordered by the court to pay each of them as distributees of the estate—*Held*, that the plea was good. *TOMPKINS, J., dis. Whaley v. Cape*, iv. 233.

27. The statute regulating set-off, (R. S. 1835, 579,) applies to corporations, and to suits instituted by a corporation before a Justice. (R. S. 1835, 348, § 5—355, § 13.) *City of St. Louis v. Rogers*, vii. 19.

28. Where a party takes a note payable to him as administrator, his individual debts may be set-off against such note. The words describing him as adminis-

trator are merely *descriptio personæ*. *Lacompte v. Seargent*, vii. 351. *Thomas v. Relfe*, ix. 373.

29. In a suit in favor of an administrator, on a demand which accrued to him after the intestate's death, the defendant cannot set-off a claim in his favor which accrued against the deceased in his life time. *Woodward v. McGaugh*, viii. 161.

30. One of several defendants, in an action *ex contractu*, may sett-off a debt due to him severally from the plaintiff. *Austin v. Feland*, viii. 309. *Kent v. Rogers*, xxiv. 306.

31. A joint demand cannot be set off against a separate debt. *Finney v. Turner*, x. 207.

32. One partner cannot set-off a debt against the partnership, before a settlement, against a separate demand of the other partner. *Ibid*.

33. A balance which may be due on a settlement of a partnership, cannot be set up in equity against a note given by one partner to the other, in the hands of an assignee, on the ground that the assignor had left the State without leaving property here, the note not being in any way connected with the partnership, and the assignment being made prior to the removal of the assignor. *Pool v. Delaney*, xi. 570.

34. In an action for services rendered as an agent, it is competent for the defendant to set-off moneys collected for him by the plaintiff while in his employment, without proving a demand prior to the commencement of the suit. *Paul v. Carroll*, xii. 437.

III. CLAIMS FALLING DUE AFTER ACTION BROUGHT.

35. The maker of a bond or note cannot set-off claims against the assignor, which accrue after suit commenced by the assignee. *Frazier v. Gibson*, vii. 271.

IV. NOTICE, PLEADING AND JUDGMENT.

36. A set-off being in the nature of a cross action, the notice should contain the substance, at least, of the declaration. *Brady v. Hill*, i. 315.

37. On an appeal from the judgment of a Justice, the defendant cannot plead a set-off by way of a plea *puis darrien continuance*. (R. S. 1835, 371, § 16.) *Chase v. Chase*, viii. 103.

38. It is not necessary in a plea of set-off to an action brought in the name of the assignee of a note, to aver that the debt sought to be set-off was due at the time of the assignment. *Austin v. Feland*, viii. 309.

39. One execution cannot be set off against another in the hands of a sheriff, where the sum due on the first had been assigned in good faith before the latter was delivered to the officer. (R. S. 1845, 1006, § 6.) *Primm v. Ransom*, x. 444.

40. Where one brings suit on an account, and therein credits the defendant with the amount due him, and recovers judgment for the balance, this constitutes

a bar to a cross action to recover the amount so credited, though an appeal is taken from the judgment. *Hudelmeyer v. Hughes*, xiii. 87.

41. Where a set-off is filed in a suit, exceeding the demand, and is unanswered, the defendant is entitled to judgment. *Hart v. Missouri State Mutual Fire and Marine Ins. Co.*, xxi. 91.

42. Where the plaintiff sued for the balance of a note given for a patent right, and the defendant pleaded that the patent right was void, and the note was therefore without consideration, and also pleaded deceit, it was *held*, that the defendant, if he prevailed, not having pleaded a set-off, was not entitled to a judgment for the money which he had already paid on the note. *Jolliffe v. Collins*, xxi. 338.

43. A plaintiff cannot set up by way of defense to a set-off a demand against the defendant that he might have included in his petition. *Dawson v. Dillon*, xxvi. 395.

See BONDS, NOTES AND ACCOUNTS, VII;...JUDGMENT, 33;...JURISDICTION, 27;...PLEADING, 157;...PRACTICE, 31;...WITNESS, 29.

SHERIFF.

I. LIABILITY.

II. DEPUTY.

III. BOND.

I. LIABILITY.

1. Where an execution was issued on a void judgment, and the money made, and paid over to the plaintiff, and afterwards the defendant commenced proceedings against the sheriff to compel him to return the money, it was *held*, that the execution having issued from a court having jurisdiction of the subject matter, and being legal in form, the sheriff was not bound to look into the antecedent proceedings, but having obeyed the command of the writ, though it issued on a void judgment, he was not responsible to the defendant. *Brown v. Henderson*, i. 134.

2. The Supreme Court having declared unconstitutional the act of December 28th, 1821, providing that execution should be stayed. &c., &c., (1 Ter. L. 817,) a Sheriff who, under that act, failed to levy an execution, was held liable to the plaintiff for the full amount thereof. *JONES, J., dis Brown v. Ward*, i. 209.

3. An action lies against a sheriff for failing to execute a writ issued by a Court of Chancery, commanding him to seize and detain certain personal property which had been mortgaged, and which the mortgagor, before the time of

payment arrived, was about to remove out of the jurisdiction of the court. In such a case it is no defense that the debt was not due when the writ was issued by the Court of Chancery. A present debt, payable in future confers the jurisdiction. *Berry v. Burckhardt*, i. 418.

4. And the rule of damages in such case is the actual loss occasioned by such failure. *Ibid.*

5. Under a statute authorizing damages at the rate of ten per cent. per month, to be awarded against a sheriff, who had collected money and refused to pay it over, (1 Ter. L. 193, § 7,) a party claiming to recover the damages must, in order to entitle himself thereto, show a special demand upon the sheriff and a refusal by him to pay. The commencement of an action against him is not such a demand as will make him liable. *Pope v. Hays*, i. 450.

6. Under the statute, (R. S. 1835, 260, § 52,) a sheriff is liable for escapes which occur through negligence. *Warberton v. Woods*, vi. 8.

7. But a sheriff is not liable for an escape which occurs while he is deviating from the line of his duty at the request of the plaintiff, although he may have been negligent therein. *The State v. Woods*, vii. 536.

8. Where the sheriff makes a false return, by which the plaintiff is prevented from obtaining a judgment, he may proceed immediately against the sheriff, without further prosecution of the action. *Palmer v. Crane*, viii. 619. *Same case*, ix. 266.

9. A sheriff, having an execution running against the body of the defendant, is not liable in trespass for arresting him, although not legally liable to arrest. In an action against a sheriff for not arresting the defendant in an execution, the sheriff may show that he was not liable to arrest, but his return will not be evidence for him. *The State v. Hamilton*, ix. 784.

10. Where a plaintiff makes a mistake in the amount of his claim, in his petition, affidavit and writ, and the officer who makes the attachment releases the property on the defendant paying to him the amount, as stated in the writ, and the costs, though the plaintiff afterwards recovers judgment for the full amount of his claim, he has no cause of action against the officer. *Page v. Belt*, xvii. 263. See EXECUTION, VIII.

II. DEPUTY.

11. A sheriff is responsible for all trespasses committed by a deputy by color of his office. *The State v. Moore*, xix. 369.

III. BOND.

12. A sheriff and his sureties are not liable, on his official bond, for not delivering over to his successor a writ of execution which had not been levied before he went out of office. *JONES, J., dis. Governor v. M'Nair*, i. 302.

13. The sheriff levied an execution on property, as the property of M. Subsequently, the judgment on which the execution was issued was reversed, and

restitution of the proceeds of the sale awarded against the sheriff, who had not paid over the money. A suit was instituted on the sheriff's bond, to the use of M., to recover the money. The defendants, as sheriff's securities, pleaded that M., before the rendition of the judgment, had conveyed the property levied upon to one J., for the purpose of defrauding his creditors—*Held*, that as the judgment was reversed, an inquiry into the fraud alleged was immaterial. *Smithers v. The State*, vii. 342.

14. An action of covenant will not lie upon a sheriff's bond. *The State v. Woodward*, viii. 353.

15. The legislature may enlarge the duties of a sheriff during the term for which they are elected, and their securities are liable for the faithful performance of them. *Marney v. The State*, xiii. 7.

16. A sheriff, during his first term, made a sale of real estate, on credit, under the statute relating to partition. He was elected for a second term and gave a new bond, and during the second term collected the money and failed to pay it over—*Held*, that the failure to account for the money was a breach of his first bond, and that his securities in that bond were liable thereon. *Ibid*.

17. The securities in a sheriff's bond are liable for his failure to pay over money received in his official capacity during the term of office covered by their bond, although the money arose from a partition sale made by him during a previous term of office covered by a bond with different securities. *Ingram v. McCombs*, xvii. 558.

18. Where the plaintiff or his attorney directs a sheriff to proceed under an execution in some way other than that prescribed by law, he makes the sheriff his agent, and the securities of the sheriff are not then liable for his acts. *Rollins v. The State*, xiii. 437.

19. But the mere application to the court by the plaintiff for an erroneous or illegal order, upon which a writ issues, is not such an interference as makes the executive officer his agent, so as to relieve the sureties of the officer of their liability. *Ibid*.

20. The securities in a sheriff's bond are liable for a trespass committed by the sheriff, in seizing property exempt from execution. *The State v. Moore*, xix. 369. *The State v. Farmer*, xxi. 160.

21. A suit upon a sheriff's bond is properly brought in the name of the State. *The State v. Moore*, xix. 369. *Meier v. Lester*, xxi. 112.

See ACTION, 47 ; . . . EVIDENCE, 135 ; . . . FEES, I ; . . . PLEADING, 80 ; . . .
REVENUE, 25-27.

SLAVES AND SLAVERY.

I. SLAVERY.

- a. IN AMERICAN COLONIES.
- b. IN NORTH-WESTERN TERRITORY.
- c. GENERALLY.

II. SLAVES.

- a. COLOR RAISES PRESUMPTION OF SLAVERY.
- b. SLAVE'S DISABILITY.
- c. INCREASE.
- d. TRANSPORTING SLAVES.
- e. RUNAWAY SLAVES.
- f. HIRING SLAVE.
- g. CONVEYANCE OF.
- h. OFFENCES BY OTHERS RELATING TO SLAVES.
- aa. Selling Liquor.
- bb. Hiring without Master's Permission.
- cc. Meeting with.
- dd. Dealing with.

I. SLAVERY.

a. IN AMERICAN COLONIES.

1. Though there seems to have been no law by which negroes were reduced to, or held in bondage, in the Spanish, French and British colonies in America, yet it is an historical fact, that the slavery of the negro race was legal in those colonies. *Charlotte v. Chouteau*, xxi. 590.

b. IN NORTH-WESTERN TERRITORY.

2. The United States, under the Articles of Confederation, had power to purchase the North-Western Territory, and to prohibit slavery therein. *Winny v. Whitesides*, i. 472.

3. By the ordinance of 1787, the children of the negro slaves held as such in the territory North-West of the Ohio, who were born after the date of that ordinance, were free. *Merry v. Tiffin*, i. 725, 780.

4. The words of the act of Virginia ceding the North-Western territory, to the effect "that the inhabitants shall be protected in the enjoyment of their rights and liberties," are completely satisfied by securing to them the enjoyment of such rights as they then had. *Ibid.*

5. The ordinance of 1787, was intended as a fundamental law for those who may live under it, and not as a penal statute to be construed by the letter, but will be construed liberally. *LaGrange v. Chouteau*, ii. 19.

6. The ordinance of 1787 did not impair rights then subsisting; and negroes held in slavery in the North-Western territory, previous to the passage of that act, were not entitled to their freedom by virtue of its provisions. *Theoteste v. Chouteau*, ii. 144.

7. The Constitution of Illinois is not controlled by the ordinance of 1787, as to the existence of slavery in that State. *Vincent v. Duncan*, ii. 214.

c. GENERALLY.

8. It is not necessary to show any general custom or usage, in a country of holding negroes in slavery, to establish its legality. If it exist in fact, even to a

limited extent, and is not prohibited by any positive law, it is sufficient. *Charlotte v. Chouteau*, xi. 193.

See EVIDENCE, 20, 21.

II. SLAVES.

a. COLOR RAISES PRESUMPTION OF SLAVERY.

9. In all the slave holding States, color raises the presumption of slavery, and until the contrary appears, a negro is deemed to be a slave. *Per* NAPTON, J. *Rennick v. Chloe*, vii. 197.

b. SLAVE'S DISABILITY.

10. A slave is incapable of acquiring a permanent settlement, or regular domicile by residence. *Vincent v. Duncan*, ii. 214.

c. INCREASE.

11. A slave was sold to serve ten years, and then to be manumitted forever. Within the ten years she had a child—*Held*, that the child was not entitled to freedom. A child born of a slave is a slave. *Lee v. Sprague*, xiv. 476.

12. A conveyance of a negro woman to another during her natural life, and reserving the increase of the negro for the heirs of a third person, to be divided among them by the grantor or his personal representatives, passes no present interest in the increase of the negro to such heirs, and they cannot have partition of them. *Davis v. Foster*, xv. 395.

13. A. brought an action of trespass against B. for taking and converting to his own use a female slave, and recovered judgment, which was satisfied. During the pendency of the suit the slave was delivered of a child. A. afterwards brought this suit for the value of the child—*Held*, that he could not recover. *Garth v. Everett*, xvi. 490.

d. TRANSPORTING SLAVE.

14. Steamboat owners are embraced within the act relating to slaves, (R. S. 1825, 747,) and an action on the case lies against them, as well as against ferry-men and owners of small craft, for violating its provisions. *Russell v. Taylor*, iv. 550. *Same case*, v. 244.

15. And no previous conviction in any other mode is necessary to sustain an action on the case under the statute. *Ibid.* *Ibid.*

16. The act which makes it a penal offense for the captain of a steamboat to carry a slave out of this State, (R. S. 1835, 586, § 36,) is to be strictly construed, and applies only to such as knowingly carry away a slave. For such an act the owners are not liable. *Price v. Thornton*, x. 135.

17. But in an action of trespass against the captain of a steamboat for taking away a slave on his boat, it is not necessary to show that he knew the negro to

be a slave ; nor is it any justification that ordinary diligence was used in attempting to ascertain whether he were a slave. *Eaton v. Vaughan*, ix. 734.

18. The master of a steamboat is liable, under the statute, (R. S. 1845, 1018, § 31,) for transporting a slave from one place to another in this State without the consent of the owner, although he may not be aware of the fact of such slave being on board, unless he use proper care to guard against the occurrence. *Withers v. St. Bt. El Paso*, xxiv. 204.

19. And the degree of care required of the master, in such case, is not the strictest diligence, but such care as thoughtful and prudent men, engaged in affairs equally hazardous to their own rights of property, would take in order to protect themselves from loss and injury. *Ibid.*

20. The owners of a steamboat are liable to the owner of a slave carried off and lost by the carelessness of the captain of said boat, in permitting the slave to be employed on his boat. *Price v. Thornton*, x. 135.

21. The declarations of the captain at the time of taking a slave upon his boat, or during the voyage, are admissible against the owners, as a part of the *res gesta* ; but such declarations made subsequently thereto, are inadmissible. *Ibid.*

22. The statute relating to slaves, which provides a remedy against any master, commander or owner of any boat, who shall transport a slave out of the State, without the consent of the owner of the slave, (R. S. 1845, 1018, § 31,) does not apply to a part owner of a vessel, who is not personally engaged in, or consenting to, the prohibited transaction. *Lee v. Sparr*, xiv. 370.

23. The privilege conferred by statute, enabling negroes held in slavery to sue for their freedom is a personal privilege, and so long as a slave acquiesces in his condition, another cannot litigate his right to freedom. The freedom of a slave is, therefore, no defense to an action against a steamboat for transporting a slave out of the State, without the consent of his master, whereby he was lost. [OVER-RULING *Chouteau v. Hope*, vii. 428.] *Calvert v. St. Bt. Timoleon*, xv. 595.

24. The act concerning slaves gives, in § 31, to the owner of a slave transported out of the State, or from one point to another within the State, on board of any vessel, a right to sue the master, commander or owner of the vessel, and recover the value of the slave ; and by § 32, imposes the same penalty on the boat, (R. S. 1845, 1018)—*Held*, that a recovery under one section was a bar to a recovery under the other. *Calvert v. Rider*, xx. 146.

25. The clerk of a boat, being sued, not under the statute, but in an action of trespass, for transporting a slave out of the State, whereby the slave was lost, on proof that he received the passage money from the slave, was held liable. *Ibid.*

See PRACTICE, 98.

E. RUNAWAY SLAVES.

26. The person who actually apprehends the slave, makes the affidavit, and has the slave committed to jail, is to be deemed the taker up of the slave. *Dougherty v. Tracy*, xi. 62.

27. A private person has no right to call upon an officer to take a slave ; he has the right to take the slave himself, and if he call upon an officer, and the

officer arrests and commits the slave, the officer will be entitled to the reward. *Ibid.*

f. HIRING SLAVE.

28. Where a person hires a slave for a year, and the slave dies during the term, the hirer is bound for the hire only to the time of the slave's death. *Dudgeon v. Teass*, ix. 857.

g. CONVEYANCE OF.

29. A deed conveying a slave, executed by several persons as grantors, some of whom were administrators of an intestate to whom the slave belonged, the deed purporting to be a conveyance by the grantors *as heirs* of the intestate, and not as *administrators*, there being no evidence that they are the heirs, or that those who convey as heirs, are the same persons who might have conveyed in that manner as administrators, is not admissible in evidence to show title in a purchaser. *Little v. Chauvin*, i. 626.

30. On the 19th June, 1838, A. mortgaged the slaves in controversy to B; the mortgage was recorded on the 18th July, 1838. On the 25th May, 1837, a distress warrant against A., issued from the treasury department of the United States, which was levied by the Marshal on the slaves, on the 15th November, 1838, and a sale of them made on the 11th June, 1839—*Held*, that the distress warrant could not become a lien upon the slaves until an actual seizin by the Marshal; that prior to an actual levy by the Marshal, A., the mortgagor, had parted with his title to the slaves; and, therefore, that the title of B., the mortgagee, was good against a purchaser at the Marshal's sale. *Dean v. Davis*, xii. 112.

31. The certificate of the acknowledgment of a deed of slaves, executed in Kentucky, began, "I, A. B., Clerk of Green County, do hereby certify," &c., and was signed "A. B. by C. D., deputy clerk"—*Held*, that the acknowledgment was sufficient. *Gibbons v. Gentry*, xx. 468.

32. A. transferred to B. a slave, and gave a bill of sale of him, absolute on its face, but which was in fact but a mortgage. The slave was delivered to B. at the time, but soon after was permitted to return to and remain in the possession of A., until his death. A.'s administrator, upon the production of the bill of sale, received from B. a sum alleged to be the balance of the purchase money, and surrendered the slave—*Held*, that this transaction did not amount to a sale, nor did it cut off the equity of redemption. *Phillips v. Hunter*, xxii. 485.

h. OFFENSES BY OTHERS RELATING TO SLAVES.

aa. *Selling Liquor.*

33. Where a party sells intoxicating liquor to a slave, without the permission of his master, owner or overseer, by which the slave is made drunk, and of which he dies, such person is liable to the owner for the value of the slave. *Skinner v. Hughes*, xiii. 440. See *Harrison v. Berkley*, 1 *Strob. R.*, 525.

34. The fact that a clerk habitually sold liquor to slaves, without permission from their masters, owners or overseers, and that his employer had knowledge of

the practice, and did not interfere to prevent it, is evidence that the sales were made under the authority of the employer, and is sufficient to subject him to liability for the consequences thereof. *Skinner v. Hughes*, xiii. 440.

35. In an indictment in two counts against a party, for selling liquor to a slave, in violation of the statute, (R. S. 1835, 292, § 7,) the defendant was charged in the first count as a grocer, and the second as a licensed grocer—*Held*, that two separate and distinct offences were charged; that a single act of selling did not show the party to be a grocer under the first count; and that it was necessary to prove the license under the second count. *Frasier v. The State*, vi. 195.

36. An indictment under the statute, (R. S. 1845, 1018, § 33,) charging a sale of whiskey to a slave, "without then and there having a written permit from the owner, overseer of said slave, or any one having legal authority over said slave, authorizing said sale," is sufficient. *The State v. Swadley*, xv. 515.

37. Where, in an indictment under the statute, (R. S. 1855, 1477, § 33,) for selling liquor to a slave without the written permission of his master, the name of the slave or master is unknown to the jurors, it is sufficient to state the fact of the want of such knowledge in the indictment. *The State v. Guyott*, xxvi. 62.

bb. *Hiring Without Master's Permission.*

38. A person who employs the slave of another without his consent, to perform labor which exposes the life of the slave, must bear the consequences; and if the slave is killed by the effects of the business in which he is thus engaged, the person so employing him is liable for his value. *Garneau v. Herthel*, xv. 191.

39. And where a slave is lost in consequence of being put to labor without the permission of his master, the party so employing him is liable for his value. *Johnson v. St. Bt. Arabia*, xxiv. 86.

40. A. hired a slave without the written consent of his master to maul rails, and was indicted therefor—*Held*, that the indictment should be quashed, the offence charged not being within the statute. (R. S. 1845, 1018, § 33.) *The State v. Henke*, xix. 225.

cc. *Meeting With.*

41. An indictment of a white person for being found at an unlawful meeting of slaves, must describe the offence in the words of the statute, (R. S. 1845, 1016, §§ 24, 25,) and so that all the facts which make the meeting unlawful, will be fully stated. *The State v. Soot*, xix. 379.

dd. *Dealing With.*

42. An indictment for dealing with a slave, should allege such dealing to have been without the consent of "the master, owner or overseer." (See R. S. 1845, 1018, § 33.) It is not sufficient to lay it as without the consent of only one of these persons. *Markley v. The State*, x. 291.

See APPEAL, 42; . . . CRIMINAL LAW, 183–190, 396; . . . EVIDENCE, 83–86;
FORCIBLE ENTRY AND DETAINER, 16; . . . INDIANS, 1; . . . ST. LOUIS, 11.

ST. LOUIS.

- I. ACTION AGAINST.
- II. ATTORNEY.
- III. CHARTER.
- IV. COMMON.
- V. DRAM SHOP.
- VI. DRAYS.
- VII. FERRY.
- VIII. FLOUR INSPECTION.
- IX. MARKETS.
- X. MAYOR.
- XI. RECORDER.
- XII. SANITARY REGULATIONS.
- XIII. STREETS, OPENING AND GRADING.
- XIV. SUBSCRIPTIONS TO RAILROADS.
- XV. SUSPENDING OFFICER.
- XVI. SUNDAY.
- XVII. TAXES.
- XVIII. VAGRANTS.
- XIX. WATER RATES.

I. ACTION AGAINST.

1. In a suit against the Mayor, &c., of the city St. of Louis, on a treasury warrant of the city, the plaintiff should allege a demand of payment of the City Treasurer. The allegation of a demand of the defendants is not sufficient. *Ferguson v. City of St. Louis*, vi. 499.

II. ATTORNEY.

2. When the City Attorney of the city of St. Louis, performs a duty imposed by an ordinance, he is entitled to the compensation therefor fixed by such ordinance, and no other. *Carroll v. City of St Louis*, xii. 444.

3. The Mayor of the city of St. Louis has no authority, under the city ordinance, to appoint an attorney, so as to make the city liable for his services. *Ibid.*

III. CHARTER.

4. Sec. 17, Art. VII, of the charter of the city of St. Louis, approved February 15th, 1841, (Acts 1840-1, 139,) was continued in force by the act of February 8th, 1843. (Acts 1842-3, 113.) *City of St. Louis v. Allen*, xiii. 400.

See LAWS, 49.

IV. COMMON.

5. The city of St. Louis has a fee simple title to its common, and may pass such title to a purchaser. *Woodson v. Skinner*, xxii. 13.

6. A power to "annul a sale" of a lot in the St. Louis Common, made under the act of March 18th, 1835, (2 Ter. L. 501,) is substantially pursued by declaring the lot forfeited to the city. *Ibid.*

7. This act provided that the Board of Aldermen might, by resolution, &c., "annul" a sale made under it for the non-payment of interest. In a deed of the "Mayor, Aldermen and Citizens of the city of St. Louis," dated March 10th, 1836, under the act, a power was reserved to the "Mayor and Aldermen" to annul the sale—*Held*, that a resolution of the City Council, consisting of the Board of Aldermen and Board of Delegates, (to whom the legislative power of the city had passed, Acts 1838-9, 158, Art. III,) declaring a lot forfeited to the city was a good annulment of the sale. *Ibid.* See PUBLIC LANDS, 164-168.

V. DRAMSHOP.

8. Under § 12 of the amended charter of St. Louis, (1 Ter. L. 969,) the corporation had power to impose fines upon persons keeping tippling houses without a license, and a Justice had jurisdiction under the charter, (R. S. 1825, 206, § 9,) in an action of debt for the recovery of a fine of one hundred dollars. *City of St. Louis v. Smith*, ii. 113.

9. Under the statute relating to the licensing of groceries in St. Louis city and county, (R. S. 1845, 1099,) the County Court has exclusive right to determine whether a license to keep a dramshop or grocery shall be granted. *Austin v. The State*, x. 591.

10. A license to keep a dramshop, granted by the city of St. Louis, does not dispense with the necessity to procure a license from the County Court. *Ibid.*

VI. DRAYS.

11. The statute, (R. S. 1825, 201, § 12,) authorizing the mayor, &c., of St. Louis to license, tax, and regulate by ordinance, drays, &c., does not empower them to prohibit slaves from being employed in driving such drays. *City of St. Louis v. Hempstead*, iv. 242.

VII. FERRY.

12. A contract to pay to the trustees of the town of St. Louis, (1 Ter. L. 379, § 4,) a larger sum for a ferry license than prescribed by law, (1 Ter. L. 495, § 1,) is void. *Riddick v. Amelin*, i. 5.

13. The city of St. Louis had not, by its charter of 1843, (Acts 1842-3, 116,

§ 2, cl. 40,) an exclusive right to license ferries within its limits. *Harrison v. The State*, ix. 526.

VIII. FLOUR INSPECTION.

14. The ordinances of the city of St. Louis numbered 2952 and 3037, do not require flour, manufactured in the city, to be submitted to inspected before sale. *City of St. Louis v. Shands*, xx. 149.

IX. MARKETS.

15. The city of St. Louis has authority, (Acts 1850-1, 158, § 2, cl. 31,) to prohibit any "person, not being the lessee of a butcher's stall, from selling or offering for sale, in market or in any other place, any fresh meat in less quantities than one quarter." (Rev. Ord. 1856, No. 3502.) *City of St. Louis v. Jackson*, xxv. 37.

X. MAYOR.

16. The proviso to § 9 of the act incorporating the city of St. Louis, which provides "that no person shall be eligible to the office of Mayor, who may, at the time of his election, hold any office of honor, trust or profit under this State or the United States," (R. S. 1825, 200,) is not repealed by a supplementary act, which provides "that the mayor of the city shall be at least thirty years of age, a citizen of the United States, shall have resided within the city at least two years preceding his election, and be otherwise qualified as in the case of aldermen." (R. S. 1825, 205, § 1.) *The State v. Merry*, iii. 278.

XI. RECORDER.

17. The charter of the city of St. Louis establishes the office of Recorder, and fixes his fees, (Acts 1840-1, 136, § 22,) and the corporation cannot pass a by-law reducing his fees, or depriving him of them, in any case in which, by the charter, he would be entitled to them. *Carr v. City of St. Louis*, ix. 190.

18. And a provision in the charter, by which the corporation is empowered to fix the compensation of its officers, (Acts, 1840-1, 132, § 1, cl. 37,) does not necessarily carry with it the power to take away fees allowed by the charter. *Ibid.*

XII. SANITARY REGULATIONS.

19. The city of St. Louis, having employed the Hospital Association to maintain the insane within their limits, is liable to the Association for their support.

Whether the city or county is bound by law to provide for the insane, is, in such case, an immaterial question. *St. Louis Hospital Association v. City of St. Louis*, xv. 592.

See LAWS, 50, 51.

XIII. STREETS, OPENING AND GRADING.

20. The power conferred on the city of St. Louis in regard to the grading of streets, lanes and avenues, is a continuing power, and is not exhausted upon the first use, but must remain to be exercised, as the judgment of the corporate powers may deem most conducive to the welfare and prosperity of the city. When, therefore, the grade of a street has been fixed, and improvements made in conformity to it, it may be altered by the corporation, and no action lies for the injury the alteration may occasion. *Hoffman v. City of St. Louis*, xv. 651.

21. Nothing in the charter of the city of St. Louis prohibits the joining in one estimate and assessment all persons who may sustain damages by the opening of a street across their land, provided the sum assessed to each owner is ascertained by the inquest. One owner cannot disturb such an inquest, except so far as it concerns himself, because the damages accruing to others have been joined therein. Neither can an inquest be set aside by the mayor, after ten days have elapsed. *McKee v. City of St. Louis*, xvii. 184.

See LAWS, 52.

XIV. SUBSCRIPTIONS TO RAILROADS.

22. By the act of February 8, 1843, (Acts 1842-3, 125, § 13,) relating to the city of St. Louis, it was provided that "the city should not, at any time, become a subscriber for any stock in any corporation," but by a special act, approved March 1, 1851, (Acts 1850-1, 722, § 9,) the city was authorized to subscribe to the stock of the Ohio and Mississippi railroad company an amount not exceeding \$500,000. An act passed March 3, 1851, entitled "an act to reduce the law incorporating the city of St. Louis, and the several acts amendatory thereof, into one act, and to amend the same," (Acts 1850-1, 168, § 13,) contained the following provisos: 1st, that "the city shall not, at any time, become a subscriber for any stock in any corporation;" 2nd, that "all acts and parts of acts contrary to and inconsistent with the provisions of this act, or within the purview thereof, &c., are hereby repealed." These several acts took effect from their passage—*Held*, that the act of March 3, 1851, did not repeal the special enabling act of March 1, 1851, and that a subscription to the stock of the Ohio and Mississippi Railroad Company, under the act of March 1, 1851, made by the city of St. Louis, was authorized by law and valid, and that the city thereby became a legal stockholder in said company. *City of St. Louis v. Alexander*, xxiii. 483.

23. The act of January 26, 1853, (Acts 1852-3, 376,) authorizing the county of St. Louis to subscribe \$200,000 to the stock of the Ohio and Mississippi Rail-

road Company, contained the following provision: "Before the subscription hereby authorized shall be made, the County Court of the county of St. Louis shall submit the question of making said subscription to the qualified voters of said county; and if a majority of those voting shall be in favor of such subscription, the County Court shall at once proceed to make the same for the county"—*Held*, 1st, that this act, under the general law, (R. S. 1845, 695, § 2,) took effect ninety days after its passage; 2nd, that the provision requiring the County Court to submit the question of making the subscription to the qualified voters of the county, was mandatory, and that a subscription without first submitting the question to the voters of the county, would be illegal; 3d, that the act must be in force before the question of making the subscription could be lawfully submitted; 4th, that the provision requiring the question of making the subscription to be submitted to the voters of the county, was constitutional. *Ibid*.

XV. SUSPENDING OFFICER.

24. Under the amended charter of the city of St. Louis, (Acts 1850-1, 158, § 2, cl. 35,) the mayor and city council were empowered "to regulate the election of all the elective city officers, and provide for removing from office any person holding an office created by this act, or by ordinance not otherwise provided for," and the charter also provided, (Art. IV, § 7,) that "the mayor shall have power to nominate, and by and with the consent of the board of aldermen to appoint, all city officers not ordered by this act, to be otherwise appointed; also to suspend, and with the consent of the board of aldermen to remove, any city officer except those elected by the people"—*Held*, that the city council might confer upon the mayor the power to suspend a city officer elected by the people. *The State v. Lingo*, xxvi. 496.

XVI. SUNDAY.

25. The city of St. Louis was empowered by its charter of March, 1851, (Acts 1850-1, 158, § 2, cl. 45,) to prohibit the keeping open of stores, shops, and other places of business, on Sunday; and those transgressing the provisions of the ordinance, (Rev. Ord. 1853, 514, § 4,) are amenable to the penalties prescribed by said ordinance. *City of St. Louis v. Cafferata*, xxiv. 94.

XVII. TAXES.

26. Under the charter of 1841, the city of St. Louis has power to levy and collect taxes upon all persons and property made taxable by law for State purposes, and has power also to sell land for the non-payment of such taxes. (See Acts 1840-1, 132, § 1-138, § 8.) *City of St. Louis v. Russell*, ix. 503.

27. Under the act of February 8, 1843, which provides that lands within the

limits of the city of St. Louis, "which have not been laid off into blocks and lots, shall not be assessed or taxed otherwise than by the acre, as agricultural lands," &c., (Acts 1842-3, 124, § 10,) lands not laid off into blocks and lots may be taxed according to their actual value; and there is nothing in the act requiring the corporation to tax them according to the supposed profits that might be made from them were they used for agricultural purposes. *Benoist v. City of St. Louis*, xv. 668.

28. By the charter of 1841, (Acts 1840-1, 129,) of the city of St. Louis, different taxes may be levied, if the total amount of such taxation does not exceed one per centum per annum, the rate limited by such charter. *Benoist v. City of St. Louis*, xix. 179.

29. And the city may levy and collect taxes according to the calendar or fiscal year, at discretion. *Scott, J., dis. Ibid.*

30. Church property in the city of St. Louis, is liable, under the Sewerage Act, (Acts 1848-9, 519,) to be assessed for the construction of sewers, &c. *Lockwood v. City of St. Louis*, xxiv. 20.

31. And so is the real estate of the Board of Public Schools of St. Louis. *St. Louis Public Schools v. City of St. Louis*, xxvi. 468.

XVIII. VAGRANTS.

32. The charter of St. Louis, giving to the mayor and city council power to regulate the police of the city, (Acts 1842-3, 116, § 2,) authorizes an ordinance to punish vagrants, and such ordinance does not conflict with the general law relating to vagrants, (R. S. 1845, 1070.) [*Jefferson City v. Courtmire*, ix. 683, discriminated from this case.] *City of St. Louis v. Bentz*, xi. 61.

33. An arrest of a person as a vagrant may be legally made without a warrant, under the ordinance of St. Louis relating to vagrants. *Roberts v. The State*, xiv. 138.

XIX. WATER RATES.

34. A superintendent of water works in St. Louis, appointed and acting under ordinance No. 2388, (Rev. Ord. 1850, 160,) received from the register blank water licenses, with the respective amounts stated therein, to be issued by him to individuals from whom it was his duty to collect, and pay over to the treasurer the sums called for in the licenses—*Held*, that *prima facie* he was chargeable with the whole amount of licenses so received, although the city auditor had not charged said licenses to the superintendent as required by the ordinance. *City of St. Louis v. Foster*, xxiv. 141.

See LANDLORD AND TENANT, IX; . . . MECHANICS' LIEN.

STRAYS.

1. In an action of trover to recover the value of an animal, the party who detained the animal as having been taken up as a stray, under the statute, (R. S. 1825, 755, §§ 1, 2,) must show an exact compliance with the provisions of the law, both as regards his own action and that of the Justice before whom the appraisement was made. *Harryman v. Titus*, iii. 302.

2. And it is so under the Revised Statutes of 1835, p. 593. *Crook v. Peebly*, viii. 344.

3. Under the amendatory act of 1847, (Acts 1846-7, 133,) the taker up of a stray steer is not required to take the same before a Justice, as required by the act of 1845, (R. S. 1845, 1039, § 4.) *The State v. Williams*, xix. 389.

4. An affidavit before a Justice, under the statute, (R. S. 1845, 1039, § 4,) made by one taking up an estray, is no evidence of the facts therein stated, in a suit brought by him against one claiming to be the owner thereof. *Parker v. Evans*, xxiii. 67.

5. It is not necessary that the taker up of an estray should, in order to acquire title, keep the animal within an inclosure for the time limited by law; it is sufficient if he bestows such care and attention upon it as a prudent and careful man bestows upon his own animals of the same kind. *Ibid.*

6. Where the taker up of a mare as a stray acquires no right thereby, a demand is not necessary to enable the owner to recover for her conversion. *Ray v. Davison*, xxiv. 280.

7. An indictment for killing a stray bull, is defective in not charging the act of killing. *The State v. Derossett*, xix. 383.

8. Where cattle are taken up and posted as strays, and the owner, within a year from the date of such taking up, forcibly takes possession of them, he must pay the legal charges of the one who took them up as strays. *Rice v. Underwood*, xxvii. 551.

TENDER.

1. To an action on a bond payable in horses, the defendant pleaded a tender—*Held*, that the tender ought to have been made at the house of the obligee, (unless he had repaired to the obligor's house to receive the horses on the day the bond matured,) and so pleaded. *Dameron v. Belt*, iii. 213.

2. A tender in current bank bills, unless objected to for that cause, is good. *Per Scott, J. Williams v. Rorer*, vii. 556.

3. Where the maker of a note had on deposit, with the holders thereof, at its maturity, a sum nearly sufficient to pay it, and tendered to the holders his (the maker's) check on the holders for such amount on deposit, together with sufficient coin to meet the balance, it was held a good tender. *Shipp v. Stacker*, viii. 145.

4. A. sold to B. a certain tract of land, and executed his bond for a conveyance. B., at the time of the purchase, promised to pay A. a part of the consideration at a future time. In the meantime B. purchased from one H. certain notes held by him on A., who was reputed to be insolvent, and tendered these notes to A. in payment of such part of the purchase money. At the time of the purchase, B. purposely avoided saying anything to A. as to the manner of making the payment, but left on his mind the impression that he was to receive the remaining part of the consideration in money—*Held*, that the notes were not a good tender of the balance of the purchase money. *Durrett v. Hook*, viii. 374.

5. Where a vendor covenants to convey to the vendee, "by good and sufficient warranty deed," the land sold, it is his duty to tender the deed to the latter. The vendee is not bound to demand the conveyance before his right of action accrues on the covenant. *Barret v. Browning*, viii. 689.

6. A tender need not be made in constitutional coin, but will be good in bank notes, unless objected to for that reason. If, however, the notes are depreciated, the refusal to accept will be presumed to be for that reason. *Cockrill v. Kirkpatrick*, ix. 688.

7. Where it was agreed that A. should give possession of certain lands, and that thereupon B. should pay a certain amount, A. must either show an actual delivery of the possession, or an offer to deliver, and a refusal to accept, before he can recover. A mere offer to deliver is not sufficient. *Garred v. Macey*, x. 161.

8. A tender of specific articles by a debtor to his creditor, does not vest the property in the creditor till they are accepted by him, but the debtor is bound to take care of them, at the risk and expense of the creditor, to await a subsequent demand. To constitute a lawful tender, the articles must be designated and set apart. *McJilton v. Smizer*, xviii. 111.

See COSTS, 39.

TORT.

1. Under the new code, (Acts 1848–9, 75, § 1,) the assignee of property converted, and of the right of action therefor, may maintain an action in his own name for the property and for damages. *Smith v. Kennett*, xviii. 154.

2. But the assignee must make a demand of the property before he can sustain a suit for it. *Ibid*.

See DAMAGES, 33 ; . . . ERROR, 14.

TOWNS.

1. Under the act concerning towns, (R. S. 1845, 1047,) where a County Court, under a state of facts, which gave it jurisdiction over the subject matter, has declared a town incorporated, the validity of its charter can only be tested by a *quo warranto*. *Kayser v. Trustees of Bremen*, xvi. 88.

See LAWS, 55.

TOWN PLATS.

1. The grantee of land in a town, a plat of which has not been filed by the proprietor, is not liable to a penalty, and the fact that the plat has not been recorded will not affect his title. *Mason v. Pitt*, xxi. 391.

TRESPASS.

- I. POSSESSION NECESSARY TO MAINTAIN TRESPASS.
- II. WHEN IT LIES.
- III. WHEN IT WILL NOT LIE.
- IV. TRESPASS ABINITIO.
- V. PLEADING.
- VI. EVIDENCE.
- VII. DEFENSE.
- VIII. DAMAGES.
- IX. NEGLIGENCE.

I. POSSESSION NECESSARY TO MAINTAIN TRESPASS.

1. A lessor cannot maintain trespass, *quare clausum fregit*, while there is a tenant in possession. *Roussin v. Benton*, vi. 592.

2. The delivery of the key of a house to a party, for the purpose simply of giving him possession of certain goods therein, does not give him such possession as would enable him to maintain an action of trespass. *Davis v. Wood*, vii. 162.

3. Title to personal property is not necessary to maintain trespass against a stranger. Possession alone is sufficient. *Boston v. Neat*, xii. 125.

4. Purchasers of land cannot, by an act of their own, gain such possession as will enable them to maintain trespass against those in the adverse possession of the premises. *Sigerson v. Hornsby*, xiv. 71.

II. WHEN IT LIES.

5. In an action of trespass for killing a slave—*Held*, that the private injury is not merged in the public offense. *Nash v. Primm*, i. 178. *Mann v. Trabue*, i. 709.

6. Trespass may be maintained by the owner of land for a disturbance of the possession of one placed by him in charge thereof. *Russell v. Thorn*, i. 390.

7. An action of trespass may be sustained for cutting trees, &c., although the statute authorizes damages in an action of debt. *Montague v. Papin*, i. 757.

8. An action of trespass, *quare clausum*, will lie before a Justice for the recovery of single damages, (R. S. 1825, 473, § 1.) Treble damages are recoverable only in an action of debt. (R. S. 1825, 781, §§ 1, 2.) *Papin v. Ruelle*, ii. 28.

9. Trespass *vi et armis* will not lie against a creditor whose execution was levied upon the property of the plaintiff, where the creditor was not present at or aiding in the levy, although the officer acted under his directions. *Dameron v. Williams*, vii. 138.

10. But, *per* Scott, J., in trespass all are principals, and those who direct a trespass or assent to it after it is committed for their benefit, are equally liable with those who actually commit it. *Canifax v. Chapman*, vii. 175.

11. Where a party takes possession of lands of the United States, without any valid claim or title, he is a trespasser, and may be sued in trespass *quare clausum fregit*, by a purchaser from the United States, for an injury to the freehold, after such purchase. *Gale v. Davis*, vii. 544.

12. Where the goods of one are seized under an attachment against another, and on an interpleader filed by the owner of the goods so taken, the plaintiff in the attachment defends against it, such action of his is evidence of his assent to the seizure by the officer, and such subsequent assent will render him liable in trespass. *Perrin v. Clafin*, xi. 13.

13. If any person other than a public officer be deputed to execute a search warrant, the deputation is wholly void, and will neither justify, excuse, or mitigate any act done under it. *Halsted v. Brice*, xiii. 171.

14. The sureties in a bond of indemnity, which is given to a sheriff to procure the sale under execution of property belonging to a party other than the defendant in the execution, are liable as trespassers. *Wetzell v. Waters*, xviii. 396.

15. The statute of 1845, giving treble damages in cases of trespass on land does not take from the party the common law remedy. *Tackett v. Huesman*, xix. 525.

16. A., claiming to own certain land which belonged to B., sold timber from it to C., who cut and removed the same—*Held*, that A. was liable to B. as a principal trespasser. *Dreyer v. Ming*, xxiii. 434. [See *Wall v. Osborne*, 12 Wend. 39.]

See ACTION, 54.

III. WHEN IT WILL NOT LIE.

17. An action of trespass will not lie against a party for suing out and levying an attachment upon goods, although the debt, on which the suit was founded, was not due at the commencement of it. *Ivy v. Barnhartt*, x. 151.

18. The bailee of a horse sold it as his own, and the real owner demanding the horse of the vendee, (who was a minor,) the father of the latter advised him to retain it till he had made further inquiry—*Held*, that the father was not liable as one who had advised or given countenance to the continuation of the unlawful detention. *Sartin v. Saling*, xxi. 387.

19. A license granted to enter upon land cannot be revoked so as to make an act done thereunder trespass. *Fuhr v. Dean*, xxvi. 116.

IV. TRESPASS AB INITIO.

20. If proceedings have been had under a judgment valid at its rendition, but which is afterwards set aside, the avoidance does not, by relation, so affect the proceedings as to make those who instituted or acted under them trespassers *ab initio*. *Bank of Missouri v. Franciscus*, xv. 303.

V. PLEADING.

21. In an action of trespass *quare clausum fregit*, where there is a *novel assignment*, the plea professing to answer the whole of the new assignment, must answer the whole, or it will be bad on general demurrer. And a plea to such new assignment, averring that a *part* of the tract of land mentioned belonging to third persons, who authorized an entry, is bad, and can be reached by general demurrer. *Price v. Perry*, i. 542.

22. Whatever the plaintiff is under the necessity of newly assigning, in order to avoid the effect of the plea, whether it be of time, place or circumstance, must be stated with as much precision as in the declaration. *Ibid*.

23. In a plea of justification to an action of trespass, *de bonis asportatis*, the trespass is sufficiently admitted by an averment in the plea that the defendant took the chattels in the declaration mentioned. *Burton v. Sweaney*, iv. 1.

24. And where, in such action, the justification is that the defendant took the property as constable in levying an execution, it is not necessary to set out the judgment in the plea, or to show that the execution followed the judgment, or that the property taken had been sold. *Ibid*.

25. The allegation in the declaration that the defendant "detained, converted," &c., the property, is matter of aggravation and need not be answered in the plea. *Ibid*.

26. In an action of debt before a Justice, under the statute to prevent certain trespasses, (R. S. 1825, 781,) the plaintiff's statement must show that the land trespassed upon is in the State, and where it lies. *TOMPKINS, J., dis. Donohoe v. Chappell*, iv. 34.

27. In an action of trespass against an officer, it is not necessary to declare against him officially. *Davis v. Cooper*, vi. 148.

28. In an action of trespass the replication to a plea, justifying the taking under an execution, alleged that the plaintiff had paid the execution, and that

the defendant acknowledged full satisfaction by giving a receipt therefor—*Held*, that the replication was bad on demurrer, for not also alleging that the defendant had paid and satisfied the execution, and that the trespass was committed after such satisfaction, but that the demurrer having been withdrawn, the replication was good after verdict. *Ibid*.

29. As possession, without title, is sufficient to maintain trespass against a wrong-doer, a plea which alleges that the close, upon which the trespass is charged to have been committed, was not the freehold of the plaintiff, but of the United States, is bad. *Richardson v. Murrill*, vii. 333.

30. In an action of trespass on land, the defendant pleaded that he was overseer of a road, on which were bridges, and to repair them he had taken timber from the plaintiff's land, it being "the nearest unimproved land to the bridges," &c. Replication that "it was not the nearest unimproved land," &c.—*Held*, that the replication denied both the alleged location and description of the land. *Austin v. Waddell*, x. 705.

31. Where the defendant seeks to show that the plaintiff has no interest in the suit, that he has assigned all his interest therein, he must set up this matter in his answer. *Goetz v. Ambbs*, xxvii. 28.

See *INFRA*, 36, 37.

VI. EVIDENCE.

32. An averment, in a petition in trespass that the defendant beat and struck plaintiff, will be sustained by evidence showing that he was present aiding and encouraging others in so beating and striking him. *Goetz v. Ambbs*, xxvii. 28.

VII. DEFENSE.

33. In trespass *quare clausum fregit*, it is a good defense that the defendant had received a grant of a right of way over the premises from the plaintiff's grantor, prior to the conveyance to the plaintiff. *Walker v. Newhouse*, xiv. 373.

34. Where a statute forbids the special plea of *liberum tenementum*, to an action of trespass *quare clausum fregit*, and requires that defense to be made by evidence, such a defense, if raised by the evidence, should be met by a new assignment of the abuttals of the plaintiff's close, which can only be done by evidence. *Emerson v. Sturgeon*, xviii. 170.

35. Where the defendant cut timber on the land of plaintiff, it is no defense that the plaintiff, by mistake, led him to believe that the timber was on his (the defendant's) land. *Pearson v. Inlow*, xx. 322.

VIII. DAMAGES.

36. In an action of trespass founded on the statute "for the prevention of certain trespasses," (R. S. 1825, 781,) after verdict of guilty, the court properly

enters judgment for the penalty of \$5, and double damages. *Withington v. Young*, iv. 564.

37. A count founded on the statute, in such a case, may be joined with a general count in trespass. *Ibid.*

38. Where on a declaration in trespass in two counts, one at common law and the other under the statute, a general verdict is found, it will be presumed that it was for single damages. *Cooper v. Maupin*, vi. 624. *George v. Rook*, vii. 149.

39. In an action of trespass, where the declaration contains counts under the statute and at common law, and entire damages are assessed, the damages will not be trebled, it not appearing from the verdict that the damages were assessed under the statutory counts only. *Lowe v. Harrison*, viii. 350.

40. An action of debt will lie for the recovery of the penalties imposed by § 1 of the statute to prevent certain trespasses. (R. S. 1845, 1068.) *Ellis v. Whitlock*, x. 781.

41. But this is not to be regarded as a penal statute—it merely gives the injured party an increase of damages. *Ibid.*

42. In an action of trespass, under the statute, (R. S. 1845, 1068,) the judgment should be for treble the amount of damage assessed by the jury, unless it appears that the “defendant had probable cause to believe that the land on which the trespass is alleged to have been committed, or that the thing so taken, carried away, injured or destroyed, was his own,” and it is not sufficient that the defendant supposed he was cutting on public land. *Emerson v. Beavaus*, xii. 511.

43. In an action of trespass, where the act complained of is deliberate and aggravated, the jury, in assessing the damages, are not restricted to the value of the articles taken, and interest, but may give smart money. *Milburn v. Beach*, xiv. 104.

44. Under the statute relating to trespass, (R. S. 1845, 1068, § 1,) where a plaintiff, in his petition, claimed damages for a wrongful entry upon his land and for timber cut and carried away, and there was a general verdict in his favor, and an entire assessment of damages, with no finding of the value of the timber—*Held*, that the damages could not be trebled. *Ewing v. Leaton*, xvii. 465. *Labeaume v. Woolfolk*, xviii. 514. See *INFRA*, 47.

45. In an action of trespass for selling property of the plaintiff under execution against another, the measure of damages, in the absence of any aggravating circumstances, is the value of the property at the time of the trespass and interest to the trial. *Walker v. Borland*, xxi. 289. *Funk v. Dillon*, xxi. 294.

46. A person who makes use of the wall of an adjoining proprietor, does not thereby render himself liable for one half of its cost; but if such use is injurious to the adjoining proprietor, he may have his action for damages. *Abrahams v. Krautler*, xxiv. 69. See *ADJOINING PROPRIETORS*.

47. Under the statute, (R. S. 1845, 1068, § 1,) the plaintiff is not entitled to recover, in an action of trespass, treble the amount of a verdict rendered in the following form: “We, the jury, find for the plaintiff forty-three dollars and thirty-three cents.” *Herron v. Hornback*, xxiv. 492. See *SUPRA*, 44.

48. The Hannibal and St. Joseph R. R. Co., under the act amending its charter, (Acts 1852-3, 321, § 2,) entered upon the land of the plaintiff and cut timber for the construction of its road—*Held*, that the plaintiff was not entitled to treble damages under the statute to prevent certain trespasses. (R. S. 1845, 1069, § 4.) *Lindell v. Hannibal and St. Joseph R. R. Co.*, xxv. 550.

49. *Quære*: Where the petition is in the ordinary form of a petition in trespass, but not concluding *contra formam statuti*, and not praying for treble damages, whether a judgment for treble damages, under the statute, (R. S. 1845, 1068, § 1,) could be supported? *Walther v. Warner*, xxvi. 143.

50. Where the court below refuses to treble the damages, the Supreme Court will not review its action unless the evidence bearing upon the question of "probable cause" is preserved. *Ibid*.

51. And the burden of showing "probable cause" is on the defendant; but it is not necessary that he should set it up in his answer. *Ibid*.

52. It is not necessary to show that the defendant was prompted by ill-will and hostility toward the plaintiff, to warrant the jury in giving exemplary damages in an action of trespass. *Goetz v. Ambbs*, xxvii. 28.

53. If an injury to the person be committed unintentionally, and simply from a want of care, the damages should be compensatory; if done wilfully and intentionally, exemplary damages may be allowed. *Ibid*.

54. The verdict should not be set aside on the ground that the damages allowed are excessive, unless they are so extravagant as to bear evidence of prejudice, passion, or corruption. *Ibid*.

See ADMINISTRATION, 72.

IX. NEGLIGENCE.

55. The reasonable care which persons are bound to take in order to avoid injury to others, is proportionate to the probability of injury. He who does what is more than ordinarily dangerous, is bound to use more than ordinary care. *Per* LEONARD, J. *Morgan v. Cox*, xxii. 373.

56. Any negligence in the performance of what is lawful, which causes loss to another, is an injury which confers a right of action. *Per* LEONARD, J. *Ibid*.

57. Where injury to another is caused by an act that would have amounted to trespass *vi et armis* under the old system of practice, as where one by the negligent handling of a loaded gun kills another's slave, it is no defense that the act occurred through inadvertance, or without the wrongdoer intending it. *Ibid*.

See CHANCERY, 92; . . . COSTS, 21; . . . ROADS AND HIGHWAYS, IV.

TROVER.

- I. WHEN AND FOR WHAT IT LIES.
 - II. WHO MAY MAINTAIN.
 - III. WHO MAY NOT MAINTAIN.
 - IV. CONVERSION.
 - V. POSSESSION.
 - VI. DEMAND.
 - VII. PLEADING.
 - VIII. EVIDENCE.
 - IX. DEFENSE.
 - X. DAMAGES.
-

I. WHEN AND FOR WHAT IT LIES.

1. Trover will not lie against the proprietor of a lottery for the amount of a prize drawn, where the money has not been set apart *in kind*, so that the right of the owner specifically attached. *Petit v. Bouju*, i. 64.

2. Where goods claimed by the plaintiffs came into the hands of the defendant, and it was agreed between the parties that they might remain in defendant's possession, and that, if plaintiffs should prove them to be their property, the defendant should pay for them at the current price, this agreement did not impair the plaintiffs' rights to maintain trover for the goods; and it is not necessary that plaintiffs should show that the goods belonged to them before they could maintain their action. *Vanzant v. Hunter*, i. 71.

3. Trover will not lie against a carrier for a mere neglect to deliver goods. The remedy is by special action on the carrier's liability. *Johnson v. Strader*, iii. 359.

4. Where the plaintiff leased certain premises, with the right, on the part of the lessee, to cut and sell cord-wood therefrom, he (the lessor) cannot maintain trover for such wood when seized and sold by the sheriff on an execution against the lessee. *Garesche v. Boyce*, viii. 228.

5. A distress warrant having been levied by the United States Marshal on the lands of the plaintiff, certain notes were placed by him in the hands of the defendant to be collected and applied to the payment of the distress warrant, the transfer being made to procure a release of the lands of the plaintiff from the lien of the warrant, but subject to the approval or modification of the solicitor of the treasury—*Held*, that to entitle the plaintiff to maintain an action of trover against the defendant for the notes, it is not sufficient merely to show that there was no power in any officer to release the lien. It must also be shown that the modification made by the solicitor was such as to defeat the purpose of the plaintiff, and that notice thereof had been given to the defendant, and a demand made for the notes. *Jones v. Relfe*, x. 623.

II. WHO MAY MAINTAIN.

6. D. raised a crop of corn on B.'s land. While the corn was standing in the field, but after its maturity, B. made a gift of it to D., and delivered to D. possession of the corn and of the land on which it stood. B., afterwards, without the license or permission of D., took and carried away a portion of the corn—*Held*, that trover would lie in favor of D. to recover its value. *Davis v. Barnes*, iii. 137.

7. The legal owner alone can maintain trover for a chose in action. It is not like other chattels, the title to which passes by mere delivery, and for which a bailee may maintain trover. *Webster v. Heylman*, xi. 428.

8. A mortgagee of personal property is, after judgment of foreclosure and before sale, regarded in law as the absolute owner thereof, and may maintain an action of trover to recover its value. *Dean v. Davis*, xii. 112.

See ACTION, 55.

III. WHO MAY NOT MAINTAIN.

9. Persons who cut timber on the public lands of the United States, and who are not settlers thereon, are mere trespassers, and do not thereby acquire any property in the timber thus cut, either general or special, nor can they maintain trover therefor. [OVERRULING *James v. Snelson*, iii. 393.] *Turley v. Tucker*, vi. 583.

10. The plaintiff, by his entry of public land, acquired no title to timber cut prior to his entry, and lying upon the land at the time of his entry. *Keeton v. Audsley*, xix. 362.

IV. CONVERSION.

11. The sale of a still, set in a furnace in the usual way for making whiskey, on execution by an officer, is, of itself, a conversion of it, and trover will lie for its value, although not removed. *Burk v. Baxter*, iii. 207.

12. Knowledge or ignorance, on the part of the purchaser, of the constable's right to sell the property in question, is immaterial in an action of trover against such purchaser for a conversion of such property. *Matheny v. Johnson*, ix. 230.

13. As a general rule, a bailee may deliver goods deposited with him to the bailor, or his order, although they may have been sold by the bailor since the deposit. But, where a bailee who had a lien on goods agreed with a vendee of the bailor to deliver them to him upon the payment of the charges, and then refused to comply with his agreement, and delivered them to the bailor, it is evidence of a conversion, to be submitted to a jury. *Smith v. Stephens*, ix. 863.

14. Every unlawful taking of the chattels of another with the intent to convert them to the use of any other than the owner, and every unlawful taking which destroys or alters the nature of the chattels, is a conversion. *Sparks v. Purdy*, xi. 219.

15. But the bare removal of the chattels of another, without any intent to deprive him of their possession, and which does not affect their condition, is no conversion. *Ibid.*

16. A refusal to deliver up a chattel to the owner on demand, without lawful excuse, is a conversion. *O'Donoghue v. Corby*, xxii. 393.

V. POSSESSION.

17. Possession is *prima facie* evidence of title, and will sustain trover, and the possessor will be taken to be the rightful owner till the contrary appears. *Van-zant v. Hunter*, i. 71.

18. The authorities are clear that a possession to avail and give title, must be such as to perfect the title to be derived therefrom in the person seeking to set it up, or in some one under whom he claims. *Little v. Chauvin*, i. 626.

19. The possession requisite for the maintenance of the action of trover, must be a lawful possession, and not that of a mere trespasser. *Turley v. Tucker*, vi. 583.

20. The defendant in this action cannot claim the slaves in controversy, on the ground of five years' adverse possession in himself, and those under whom he claims, under the statute, (R. S. 1845, 527, § 5,) unless possession of them had been held within this State that length of time. *Carter v. Feland*, xvii. 383.

VI. DEMAND.

21. No demand is necessary in order to maintain trover, where an actual conversion is proved. *Himes v. McKinney*, iii. 382.

22. In a suit to recover the value of property wrongfully converted, it is too late to object for the first time, in the Supreme Court, that no demand was made. *Folden v. Hendrick*, xxv. 411.

VII. PLEADING.

23. An omission in an action of trover for the conversion of a note, to allege the value of the note, can only be reached by a special demurrer. *Fry v. Baxter*, x. 302.

24. Neither payment, set-off, nor fraudulent representations as to the consideration of the note, can be pleaded as a bar to an action of trover for the conversion of the note. *Ibid.*

VIII. EVIDENCE.

25. The verdict of a jury on the trial of the right of property before a constable, is no evidence of that right, but the fact that the execution creditor, after such verdict, gave the officer an indemnifying bond, and directed him to sell the

property under the execution, notwithstanding the verdict, is admissible in an action of trover against such creditor, as showing his action or participation in the seizin of the property. *Matheny v. Johnson*, ix. 230.

26. In an action of trover, the declarations of defendant's vendor, in reference to his right to the property, are inadmissible in evidence for the defendant. *Carter v. Feland*, xvii. 383.

See PRACTICE, 259.

IX. DEFENSE.

27. A party sued before a Justice, for the value of rails converted to his own use, may, at the trial in the Circuit Court, on appeal, show title to the land upon which the rails were cut. *Wilson v. Petty*, xxi. 417.

28. It is no excuse for refusing to deliver up to the owner a paper evidencing a debt, that the debt is not justly owing, nor can it be imposed as a condition to the delivery, that he shall refund what he has already received upon it. *O'Donoghue v. Corby*, xxii. 393.

X. DAMAGES.

29. The return of chattels after a conversion, will not defeat the right of action, but will only go in mitigation of damages. *Sparks v. Purdy*, xi. 219.

30. The action having been brought to recover the value of a negro woman and child, if the child dies after demand and refusal, and the plaintiff prevails in the suit, he may recover the value of the child at the time of the demand; the measure of damages in trover being the value of the thing converted at the time of the conversion. *Carter v. Feland*, xvii. 383.

31. In an action of trover, for the conversion of a paper evidencing a debt, the measure of damages is *prima facie*, the amount the paper calls for, though they may be reduced by showing payment, or that the amount is not justly due, or by other evidence that the value is less than it purports to be. *O'Donoghue v. Corby*, xxii. 393.

32. Where a person hires a slave for a year, and the slave is wrongfully taken out of his possession during the term of service, the measure of damages is the value of the services of the slave during the residue of the term, although the action was brought before expiration of the term of service. *Moore v. Winter*, xxvii. 380. See COSTS, 7; . . . DAMAGES, 34, 35.

See DEMAND, 13, 14; . . . JURISDICTION, 28, 49; . . . LIMITATIONS, 46.

USES AND TRUSTS.

I. CONSTRUCTION.

II. WHEN AND HOW A TRUST IS CREATED.

III. TRUSTEE.

- a. APPOINTMENT.
- b. POWERS, RIGHTS AND DUTIES.
- c. LIABILITY.
- d. ACTION BY.

IV. EXECUTION OF THE TRUST.

V. RIGHTS AND REMEDIES OF CESTUI QUE TRUST.

I. CONSTRUCTION.

1. F. by deed conveyed certain slaves to his son, and one S., as trustees of his son's daughter, providing that, on the demise of the son, the slaves should be divided equally among his children, then living—*Held*, that the legal estate of S. terminated on the son's death, and that the slaves passed to the control of the guardian of the *cestui que trust*. *Ferguson v. Stephens*, v. 211.

II. WHEN AND HOW A TRUST IS CREATED.

2. Where a person who takes title from the heirs of a patentee, with knowledge that the purchase money was paid by his widow, he becomes a trustee for her, and the land in his hands, stands charged with the trust, as though no transfer had taken place. *Thompson v. Renoe*, xii. 157.

3. A. purchased a tract of land at a government sale in 1819; paid one-third of the purchase money, and the balance was made payable in instalments. Before the instalments became due, A. died, and his widow paid them out of her own funds, and a patent was issued in the name of her deceased husband—*Held*, that the widow was not a stranger to the transaction, and that a trust estate in the land, equivalent to the amount paid by her, resulted in her favor. *Ibid*.

4. Where land is purchased by one in his own name, with the funds of another, and for his benefit, the purchaser thereby becomes a trustee for the benefit of such other, and if he conveys the land, will be compelled to account for its value with interest thereon, from the sale to the decree. *Paul v. Chouteau*, xiv. 580.

5. A forfeiture of a lease fraudulently effected through the agency of a third person, to defeat the interest of a mortgage by way of sub-lease, cannot enure to the benefit of such third person; if the latter take a new lease, he will be held a trustee for the benefit of the sub-lessee. *Aspinall v. Jones*, xvii. 209.

6. Where a purchase is made by one in express trust for a married woman, there can be no resulting trust to the husband, although he paid the purchase money. *Alexander v. Warrance*, xvii. 228.

7. A deed of bargain and sale, for a valuable consideration, in trust for the use of the wife of the bargainor during life, and her heirs in fee simple, only raises a use in the bargainee, and no use could be limited to arise out of his estate. The statute of uses executes the first use only. Even if the consideration had moved from her to whom it was limited, yet it could not raise a use in her which a court of law would recognize. *Guest v. Farley*, xix. 147.

8. A father entrusted his son with money to enter land for the father, and the son entered it for himself—*Held*, to be a trust in the son resulting to the father. *Valle v. Bryan*, xix. 423.

9. The defendant, by falsely pretending to represent one to whom a Spanish claim to land had been confirmed, obtained a conveyance of it by a compromise with the city. The true representative, having afterwards failed in proceedings to establish his title against that of the city, shall not charge the defendant as his trustee, by offering to pay the compromise money. *Maguire v. Page*, xxiii. 188.

10. If one with his own money purchase land, and take a conveyance to another, though a child, a trust results to the purchaser. *Rankin v. Harper*, xxiii. 579.

11. Where an insolvent debtor purchases land, and places the title in the name of a third person, by collusion, to defraud his creditors, there is a resulting trust in favor of creditors, which may be taken and sold on execution. *Dunnica v. Coy*, xxiv. 167.

12. But a creditor purchasing at such sale, must complete his purchase by taking a sheriff's deed, before he can have a conveyance to him by such trustee decreed in equity. *Ibid*.

See FRAUDS AND PERJURIES, 4; . . . PARTNERSHIP, 11; . . . PUBLIC LANDS, 43, 44.

III. TRUSTEE.

a. APPOINTMENT.

13. The appointment of trustees may be shown by parol evidence, where it does not appear that the evidence of the appointment is in writing. *Gilbert v. Boyd*, xxv. 27.

b. POWERS, RIGHTS AND DUTIES.

14. The purchase of trust property by the trustee, carries fraud upon its face. *Smith v. Isaac*, xii. 106.

15. Where a trustee is required by the terms of the trust to invest a specific sum in lands, he is not warranted in investing a part in lands, and the balance in improvements thereon, unless circumstances require it. *Gates v. Hunter*, xiii. 511.

16. Where a trustee is required to invest trust funds for the benefit of persons, part of whom are minors, he must invest the whole amount, and cannot deliver their share to those of full age. *Ibid*.

17. A trustee cannot by deed, or otherwise, change the nature or uses of the

trusts created by the original deed. *Clark v. Maguire*, xvi. 302. *Clark v. Conway*, xxiii. 438.

18. A trustee cannot recover the trust property from a grantee of his *cestui que trust*, while the estate of the latter continues. *Bowen v. Bower*, xix. 399.

19. The rule, that a purchase of an adverse title by a trustee, mortgagee, or tenant for life, enures to the benefit of the *cestui que trust*, mortgagor or remainder man, is not applicable to cases where there is no title whatever in the *cestui que trust*, mortgagor or remainder man, and the trustee, mortgagee, or tenant for life not being in possession, is guilty of no fraud or unfair dealing, and derives no unjust advantage from the relation he sustains to the *cestui que trust*. *Price v. Evans*, xxvi. 30.

20. Where the title to which a trust or mortgage attaches, fails absolutely, the trustee or mortgagee, in the absence of fraud or unfair dealing, or unfair advantage arising out of the relation sustained to the *cestui que trust*, or mortgagee, may purchase and hold for his own benefit, an adverse title. *Ibid*.

21. By the law of Kentucky in 1830, a trustee was not incapacitated to buy the trust property from his *cestui que trust*, but such transactions should be closely scrutinized. *Sallee v. Chandler*, xxvi. 124.

C. LIABILITY.

22. Where a trustee is authorized to appoint agents to assist in the management of the trust business, without personal responsibility for their acts, and such agents are selected properly and in good faith, the trustee is not liable for their misconduct. *O'Fallon v. Tucker*, xiii. 262.

D. ACTION BY.

23. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, and by the practice act of 1849, (Acts 1848-9, 75, §§ 1, 2,) may sue in his own name. *Harney v. Dutcher*, xv. 89.

24. Trustees for the payment of debts and legacies may sustain a suit, either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they are trustees; and the rights of the creditors and legatees will be bound by the decision of the court, when fairly obtained against the trustees. *Miles v. Davis*, xix. 408.

25. A. executed a deed of slaves to trustees, for the benefit of himself and wife during their lives, and after their death to be divided among their children. A. remained in possession of the slaves, removed to Missouri and sold two of them to defendant, who had notice of the deed. After the death of A. and wife, the children brought suit for the recovery of the slaves—*Held*, that a suit by the children could not be sustained; it should have been brought in the name of the trustees or their successors. *Gibbons v. Gentry*, xx. 468.

26. Where a slave is conveyed in trust for the use of a married woman for life, she being entitled by the deed of conveyance to the possession of the slave, and upon her death for the use of her children, the wife cannot, in her own

name and that of her husband, maintain an action for the conversion of the slave, but such action should be in the name of the trustee. *Richardson v. Means*, xxii. 495.

IV. EXECUTION OF THE TRUST.

27. Where there are two joint trustees, and one dies, the other takes by survivorship. *Stewart v. Pettus*, x. 755.

V. RIGHTS AND REMEDIES OF CESTUI QUE TRUST.

28. The plaintiff conveyed certain real estate, to be held in trust for him until a certain sum should be paid to him, and then in trust for the separate use of the defendant, A., a married woman. The plaintiff bound himself to complete certain improvements then in progress upon the property, in a specified time and manner. In case of a failure to pay any instalment of the purchase money, the trustees were to sell the premises at auction, and pay the plaintiff out of the proceeds, the balance, if any, to be paid to the defendant, A. This suit was brought to foreclose the deed of trust and subject the trust property to the payment of the purchase money—*Held*, that though the defendant, A., assumed no personal responsibility, still the property stood as security for the payment of the purchase money; that she was entitled to a deduction from the amount of the purchase money to the extent of loss she had sustained by reason of the plaintiff's failure to complete the improvements according to his agreement; and that, as the plaintiff was not seeking to bind her personally, but merely to enforce the trust contained in the conveyance, he might recover, though he had failed fully to comply with his own agreement. *Soulard v. Lane*, xvi. 366.

29. A grantor in a deed of trust, who is also residuary *cestui que trust*, is a necessary party to a suit brought by a purchaser at the trustee's sale for a specific performance of the contract. *White v. Watkins*, xxiii. 423.

30. Where a trustee sells land without authority, but for the sale of which he would have been entitled to a decree of a court of equity, the *cestui que trust*, if not injured, is entitled only to have the value of the land estimated at the time of sale, and that, with interest, will be the measure of his damages. *Wilson v. Drumrite*, xxiv. 304.

31. Where trust funds are misapplied, the *cestui que trust* may follow the property acquired therewith, and assert the trust as against any one taking with notice. *Edwards v. Welton*, xxv. 379.

32. One of several *cestui que trusts* cannot single out a portion of the trust property and allege an exclusive right thereto, and assert that right in an action for its possession. *Ibid.*

See CHANCERY, 80-88; . . . HUSBAND AND WIFE, 63-67; . . . LIMITATIONS, 19, 20.

USURY.

- I. DEFENSE.
- II. RECOVERY OF USURIOUS INTEREST ALREADY PAID.
- III. CONTRACT AFFECTED WITH USURY.
- IV. PLEADING.
- V. EVIDENCE.
- VI. PENALTY.

I. DEFENSE.

1. A security may avail himself of the defense of usury. And so of an indorser for accommodation. *Weimer v. Shelton*, vii. 237.

II. RECOVERY OF USURIOUS INTEREST ALREADY PAID.

2. A party who has paid money or property by way of usurious interest cannot recover the amount so paid, when the principal debt remains due and unpaid. *Hawkins v. Welch*, viii. 490.

III. CONTRACT AFFECTED WITH USURY.

3. Although a contract is affected with usury, yet an action may be maintained upon it. *Montany v. Rock*, x. 506.

IV. PLEADING.

4. Where usury is relied on as a defense, the plea must show the facts which go to establish the usurious nature of the transaction, so that the court may judge whether it is usurious; it is not sufficient to say that the party usuriously took such a per centum premium. *Mullanphy v. Phillipson*, i. 188.

5. A general averment in a plea of usury, that a certain sum was for usurious interest, without specifying in what way the usury accrued, is bad under the statute, (R. S. 1835, 333, § 4.) *Weimer v. Shelton*, vii. 237.

6. Under the act of 1841, relating to interest, (Acts 1840-1, 95, § 2,) a plea of usury must set forth distinctly the usurious contract. *Davis v. Tuttle*, x. 201.

7. And so under the revised statutes of 1855, (p. 890, § 5.) *Bond v. Worley*, xxvi. 253.

8. Under the new code, (Acts 1848-9, 80, § 7,) usury upon a contract in another State must be specially pleaded. The act of 1847 allowing the defense of usury under the general issue, (Acts 1846-7, 63, § 4,) is only applicable to contracts made in this State. *Gunn v. Head*, xxi. 432.

V. EVIDENCE.

9. On a plea of usury to an action on a promissory note drawn in another State, and there made payable, the burden of proof is on the defendant to show that the contract was an usurious one. *Davis v. Bowling*, xix. 651.

VI. PENALTY.

10. Under the act of 1847 relating to interest, (Acts 1846-7, 63,) the jury found that the interest reserved on the note sued on exceeded the lawful rate by four per cent.—*Held*, that the court committed no error in deducting four per cent. from the principal of the note, from its date to the date of the judgment, and in giving judgment for plaintiff for the balance only of the principal. *Scott, J, dis. Mitchell v. Griffith*, xxii. 515.

11. Nor is it error in such case to give judgment against plaintiff for costs. *Ibid.*

See SECURITIES, 24.

VENDOR AND PURCHASER.

1. A letter written by a vendor after a sale by him, is evidence against him, though never sent to the person to whom it was directed; but it is not evidence against his vendee. *Gamble v. Johnson*, ix. 597.

2. A purchaser from one having only a title bond to a tract of land, will occupy the same position as his vendor, and will be bound by all notices and equities affecting him. *Broadwell v. Yantis*, x. 398.

3. Where one takes and retains possession of land, under a contract of sale, he cannot legally refuse to pay the purchase money, unless he has a right to and does rescind the contract and relinquish the possession to the vendor. *Smith v. Busby*, xv. 387.

See ESTOPPEL, VI;....EVIDENCE, 112, 113.

VENUE.

I. CHANGE OF.

1. An appearance and trial is a waiver of any irregularity in the change of venue. *Bettis v. Logan*, ii. 2.

2. Where parties have announced that they are ready for trial, and the jury

is being called, it is too late to petition for a change of venue, unless there are special circumstances to excuse the delay. *Fugate v. Carter*, vi. 267.

3. A change of venue cannot be awarded after the issues in a case have been tried and a verdict found. *Ex parte Cox*, x. 742.

4. Where a cause has been removed from one county to another by a change of venue, an application by a party, for a rule upon the clerk of the court in which the suit was first instituted, to transmit original papers in the cause, should specify distinctly and particularly the papers desired. *Maddin v. Cole*, xii. 61.

5. To entitle a party, in a civil suit, to a change of venue, he must give the adverse party reasonable notice of his application. *Byrne v. St. Louis Public Schools*, xii. 402.

6. And a change of venue should not be granted, where applied for in the course of the trial, without any previous notice. *Perry v. Roberts*, xvii. 36.

7. The voluntary appearance of the party resisting a change of venue, and taking steps in the cause after the change, gives the court to which the cause is removed jurisdiction over his person, and waives all prior informalities. *Powers v. Browder*, xiii. 154.

8. A change of venue is properly refused, unless the party has complied with the requisitions of the statute. *Lewin v. Dille*, xvii. 64.

9. Where a cause had been removed from one judicial circuit to another, and the transcript of the record sent to the latter stated that the answer could not be found, it was *held*, that a rule upon the other court for a more perfect transcript of the record, was properly refused. *Owens v. Tinsley*, xxi. 423.

10. The fact that the affidavit accompanying a petition for a change of venue may have been defective, will not render the order changing the venue a nullity; nor should the court to which the cause is transferred dismiss the suit for this defect. The objection should be made at the time the petition for a change of venue was acted upon. *Potter v. Adams*, xxiv. 159.

See CRIMINAL LAW, 213-217; . . . PLEADING, 17.

VERDICT.

1. A verdict rendered for a party "by order of the court" is not sufficient to authorize a judgment. *Perry v. Beard*, i. 637.

See BREACHES OF THE PEACE, 20; . . . CRIMINAL LAW, 345-353; . . . FORCIBLE ENTRY AND DETAINER, 50; . . . PLEADING, VIII; . . . PRACTICE, XI.

WARRANTY.

- I. ON SALE OF PERSONALTY.
- II. ON SALE OF SLAVES.
- III. ON SALE OF REALTY.

I. ON SALE OF PERSONALTY.

1. Where both the vendor and vendee, at an auction sale, are aware of the unsoundness of the horse sold, and there is no express warranty, the purchaser cannot recover damages for the unsoundness, although the auctioneer declared that the horse was sound so far as anything was known to him. *Dooly v. Jennings*, vi. 61.

2. In the sale of cattle there is no implied warranty of their freedom from vicious propensities and mischievous habits. Nor is the vendor bound to disclose his knowledge as to their propensities or habits. *McCurdy v. McFarland*, x. 377.

3. In the sale of a land warrant, there is an implied warranty that it is valid. *Presbury v. Morris*, xviii. 165.

4. Where one in possession of personal property sells it for value, the law implies a warranty of the title. *Robinson v. Rice*, xx. 229.

5. In demurrer to a petition upon a breach of warranty of the soundness of a horse, it was held that the plaintiff, in his pleadings, need not negative the idea that the defects were patent. The general averment of unsoundness would seem to be sufficient. *Labeaume v. Pocilington*, xxi. 35.

6. Where a bill of sale of a patent right contained no warranty, but only a simple transfer of title, it was held that the vendee could not set up a parol warranty made at the time of the transfer. *Jolliffe v. Collins*, xxi. 338.

II. ON SALE OF SLAVES.

7. A bill of sale warranting a slave free "from all vices and diseases prescribed by law," is a warranty against "all vices and diseases," the words "prescribed by law" being rejected as unmeaning; and the warranty is against "all vices and diseases" existing at the time of sale. *Sloan v. Gibson*, iv. 32.

8. Although a general warranty of soundness will not cover a defect visible to the senses, yet the existence of a malignant disease, such as scrofula, in a slave sold, which cannot always be detected by mere inspection, is not among those visible defects not included in a general warranty of soundness. *Per* NAPTON, J. *Thompson v. Botts*, viii. 710.

9. A bill of sale contained these words: "I, J. B. B., have sold to J. B. S. a negro woman named L., aged 41 or 42 years, stout and healthy, for the sum of," &c.—*Held*, that the words "stout and healthy," constituted a warranty of soundness. *Steel v. Brown*, xix. 312. [OVERRULING *Soper v. Breckenridge*, iv. 14.]

III. ON SALE OF REALTY.

10. A deed conveying a lot of ground, describing it as "with a brick tenement thereon," does not amount to a covenant that such tenement was on the lot. The words are mere descriptive. *Dryden v. Holmes*, ix. 134.

11. A deed described a part of the land conveyed as "lying west and adjacent to the tract of land first above mentioned"—*Held*, to be words of description, and not amounting to a covenant that the land did in fact lie west and adjacent to the first mentioned tract. [*Campbell v. Russell*, iii. 578, commented upon and overruled.] *Ferguson v. Dent*, viii. 667.

12. The remedy by the ancient warranty real of the common law never had any practical existence in the United States; and the principles which were applied to it, having their origin in the feudal system, are not applicable to the covenant of warranty used in our system of conveyancing. *Rector v. Waugh*, xvii. 13.

13. A grantee has no recourse against his grantor upon his covenant of warranty, for money paid to purchase in an adverse title without contestation. *Caldwell v. Bower*, xvii. 564.

See COVENANT, 42-45; . . . CRIMINAL LAW, 59; . . . DAMAGES, 36, 37; . . . EXECUTION, 107; . . . SALE, V; . . . SECURITIES, 34.

WAY.

I. DEDICATION TO PUBLIC USE.

II. RIGHT OF WAY.

III. EASEMENT.

IV. OWNERSHIP OF SOIL.

V. CONDEMNATION TO PUBLIC USE.

- a. NOTICE.
- b. COMPENSATION.
- c. BENEFITS.
- d. PAYMENT.
- e. LANDLORD AND TENANT.

I. DEDICATION TO PUBLIC USE.

1. It is well settled that the owner of land may, without deed or writing, dedicate it to public use. But where such owner is interested in proving such dedication, and seeks to gain some advantage thereby, he will be held to strict proof. *Rector v. Hartt*, viii. 448.

2. Facts stated which the courts consider sufficient to warrant a court or jury

in presuming that private property has been dedicated to public use. *Gamble v. City of St. Louis*, xii. 617.

3. Where a proprietor of lands, when laying them off as part of a city, dedicates a part to public use as an alley, no ordinance is necessary declaring it such. *Taylor v. City of St. Louis*, xiv. 20.

4. The mere fact that a farmer suffers the public to pass through his farm for fifteen years, is not sufficient evidence of an intention to dedicate a way to the public. *Stacey v. Miller*, xiv. 478.

5. Dedication of a way to the public use may be proved by any evidence competent to show the intention of the owner of the land to make it; it is not necessary to show the use of it for twenty years. *Ibid.*

6. Where the proprietor of town property lays it out into lots, with streets and avenues running through it, and sells his lots with reference thereto, it is a dedication of the streets and alleys to the public, and he cannot afterwards resume his control over them. And the same principle applies to open squares, public walks and commons. *City of Hannibal v. Draper*, xv. 634.

7. G. filed in the office of the recorder of Marion County, a duly acknowledged plat of the town of Hannibal. Amongst other memoranda on the map was the following: "Lots numbered 2, 3, 4, in block 26, is intended for church grounds," and across said lots were written the words, "church grounds"—*Held*, that, under the act concerning plats of towns, the lots so designated vested in fee in the county for the public use of the town of Hannibal. *Ibid.*

8. Where A. conveys land in a city to B., a part of which has been dedicated to public use, parol evidence is admissible, in a proceeding between the city and B., to show that B. received the conveyance with full knowledge of the dedication. Land may be dedicated without a deed. *McKee v. City of St. Louis*, xvii. 184.

9. To authorize the presumption of an intention to dedicate land to the public as a street, there must either be an acquiescence by the owner for twenty years in the free use and enjoyment of such land as a public street, or such clear, unequivocal and decisive acts as will amount to an explicit manifestation of his intention to make a dedication. *Missouri Institute v. How*, xxvii. 211.

10. And the same length of time of non-user would, it would seem, be necessary to raise a presumption of abandonment by the public. *The State v. Young*, xxvii. 259.

II. RIGHT OF WAY.

11. A right of way over the land of another, cannot be sustained upon the mere ground of necessity. *Cooper v. Maupin*, vi. 624.

12. Where the owner of a block of ground in the city of St. Louis made a partition of it among several persons, and in each deed made an alley running through the block the boundary of the lots, each proprietor becomes entitled to a private right of way in the alley, and to an action for its disturbance. *Carlin v. Paul*, xi. 32.

13. A right of way exists from necessity, where an individual owns land sur-

surrounded by lands of others excluding it from any public highway. *Snyder v. Warford*, xi. 513.

14. A right of way is only an easement, and not an interest in land. The act of 1845, (R. S. 1845, 1074,) does not apply private property to private uses, but vests the right of way in the party, his heirs and assigns forever. *Ibid*.

15. When the owner of land upon which a State road is located, executes a grant, the public then acquire a right of way over it; and upon the report of the commissioners or of a jury of the damage assessed in favor of the owner of land upon which such road is located, he acquires a vested right to the amount, and is entitled to a warrant therefor, although the road is never actually opened. *Wilkerson v. Buchanan County*, xii. 328.

III. EASEMENT.

16. Where two contiguous fields of unequal elevation belong to different proprietors, the inferior is obliged to receive the water that falls from the superior; and if the owner of the former dams up the water by building upon his own land, he cannot recover of the owner of the other for the consequent damage to his own property. *Laumier v. Francis*, xxiii. 181.

17. An easement can be created only by deed. *Fuhr v. Dean*, xxvi. 116.

18. So a right to enter on another's land and to remain there for a certain time, or indefinitely at the pleasure of the party claiming the privilege, is an interest in the land which can be created only by deed. *Ibid*.

IV. OWNERSHIP OF SOIL.

19. The ownership of the soil beneath a public highway is retained by the adjoining proprietor, the public having a mere right of way, or easement, over the same. *Williams v. Natural Bridge Plank Road Co.*, xxi. 580.

V. CONDEMNATION TO PUBLIC USE.

a. NOTICE.

20. Where proceedings are instituted to condemn and appropriate private property to public uses, notice thereof should be given to the owner of such property or his heirs. *City of Boonville v. Ormrod*, xxvi. 193.

21. But notice given to an administrator in such case, is not notice to the heirs. *Ibid*.

22. Proceedings, instituted under an act of the legislature to condemn and appropriate private property, commenced without notice to the owner thereof, are void. *Dickey v. Tennison*, xxvii. 373.

b. COMPENSATION.

23. The State, by virtue of its eminent domain, has the right to take private property for public use, but can rightfully exercise it only in cases of public necessity, and upon paying the owner a just compensation. *Newby v. Platte County*, xxv. 258.

See LAWS, 26, 61.

c. BENEFITS.

24. The benefits to be charged against the adjacent land owners, in case of the condemnation of lands to public use, are the direct and peculiar benefits resulting to them in particular, and not the general benefit accruing to them in common with other land owners from the building of the road. *Newby v. Platte County*, xxv. 258. [*Louisiana and Frankford Plank Road Co. v. Pickett*, xxv. 535. See opinion of RICHARDSON, J.] *Pacific R. R. v. Chrystal*, xxv. 544.

See LAWS, 23, 24, 27, 28.

d. PAYMENT.

25. In proceedings instituted by the Pacific Railroad Company to obtain title to land upon which said company had located its road, a judgment was rendered against the company for the damages assessed, and an order was made transferring the title of the land to the company—*Held*, that actual payment of the damages was essential to vest the title in the company; an entry upon land prior to such payment for the purpose of constructing the railroad is not justifiable. *Walther v. Warner*, xxv. 277.

e. LANDLORD AND TENANT.

26. The condemnation and appropriation to public uses of a portion of a lot leased for a term of years, will extinguish a proportionate part of the rent, and entitle the parties—landlord and tenant—to compensation according to their respective rights. *Biddle v. Hussman*, xxiii. 597, 602. *Kingsland v. Clark*, xxiv. 24.

27. And in determining the proportionate part of the rent due to the landlord for the portion not appropriated to public uses, the jury must have reference in making their estimate, to the real value to the tenant of what is left uncondemned, and not merely to the quantity. *Ibid.* *Ibid.*

See COSTS, 31; . . . LANDLORD AND TENANT, 43; . . . LAWS, 23–29, 58, 61, 62; . . . LOCAL DECISIONS, 3–9; . . . ST. LOUIS, 21.

WEIGHTS AND MEASURES.

1. By the statute, (Acts 1840–1, 86—R. S. 1845, 1077, § 4,) a ton of hemp is 2,000 pounds avordupois, and evidence that by mercantile usage a ton of hemp consisted of 2,240 pounds, is not admissible in the interpretation of a contract. *Green v. Moffett*, xxii. 529.

WILL.

- I. EXECUTION AND ATTESTATION.
- II. VALIDITY AND EFFECT.
- III. CONSTRUCTION.
- IV. OMISSION OF A CHILD.
- V. PROBATE.
- VI. WILL, LOST, DESTROYED OR EMBEZZLED.
- VII. CODICIL.
- VIII. UNDUE INFLUENCE.

I. EXECUTION AND ATTESTATION.

1. One witness to a will lost or destroyed is sufficient, where it appears that he saw the other witnesses subscribe it in the presence of the testator. *Per TOMPKINS, J. Graham v. O'Fallon*, iii. 507.

2. The statute relating to wills, (R. S. 1835, 617,) requires, not only that the subscribing witness shall attest the signing, but also the soundness of mind of the testator; and proof by only one of the subscribing witnesses that the testator was of sound mind, is insufficient. *Withinton v. Withinton*, vii. 589.

3. A will, in order to its validity, must be executed according to the law of the testator's domicile at the time of his death. *Nat v. Coons*, x. 543.

4. If the witnesses who attest the execution of a will are competent at the time of its execution, a subsequent incompetency will not affect the validity of the execution. *Holmes v. Holloman*, xii. 535.

5. The statute requiring that "every person who shall sign the testator's name to any will, by his direction, shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request," (R. S. 1845, 1079, § 5,) is mandatory and not directory merely, and if it be not complied with, a will so signed is void. *McGee v. Porter*, xiv. 611. *St. Louis Hospital Association v. Williams*, xix. 609. *Simpson v. Simpson*, xxvii. 288.

6. Under the statute, (R. S. 1845, 1079, § 4,) a mark is a sufficient signing by the testator, notwithstanding he was able to write. *St. Louis Hospital Association v. Williams*, xix. 609.

7. A testator's name was signed to his will at his request, by another, and he then made his mark—*Held*, that this was not a sufficient execution of the will under the statute, (R. S. 1845, 1079, § 5.) *Northcutt v. Northcutt*, xx. 266. *St. Louis Hospital Association v. Wegman*, xxi. 17.

8. The deposition of a subscribing witness to a will may be taken under the general law concerning depositions. *Cawthorn v. Haynes*, xxiv. 236.

9. A will executed in 1789 in the presence of the Lieutenant Governor of Upper Louisiana, and attested by him and seven other witnesses, and deposited among the archives of the Spanish government, a copy of which was given out in 1801 by the Lieutenant Governor a few months after the death of the testator, was a valid and operative instrument under the Spanish law, without further proof. *Clark v. Hammerle*, xxvii. 55.

• See WITNESS, 59, 76. •

II. VALIDITY AND EFFECT.

10. The witness whose testimony established the contents of a will, also stated that the last time he read it before it was executed, there were several blanks, which blanks, it was also proved, were found, after the death of the testator, to be filled up in his handwriting; it being possible that the blanks might be filled either before or after the execution, it was *held* that the presumption of law was in favor of the right time to make the instrument good, that is, that the blanks were filled before the will was executed. *Graham v. O'Fallon*, iv. 601.

11. Where the testator executed his will in Mississippi, and afterwards removed to Missouri, where he died, and the will was admitted to probate in the former state—*Held*, that the original will should have been proved in this State, and that a foreign copy of it was not admissible in evidence here. *Nat v. Coons*, x. 543. *Stewart v. Pettus*, x. 755.

12. In Louisiana, wills and codicils must be kept in the office of a notary public, and a copy thereof, when so kept, is evidence in this State. *Harvy v. Chouteau*, xiv. 587.

13. An appeal will not lie from an order of court granting probate of a will. The validity of a will duly proven can be contested only in a proceeding instituted for that purpose under the statute, (R. S. 1845, 1083, § 31.) *Ex parte Duty*, xxvii. 43.

III. CONSTRUCTION.

14. Where a will provided that certain personal property "should be valued and acted on according to law," and that if there was a residue from it, and the hire of negroes, it should go to E., (complainant)—*Held*, that it was not the intent of the testator to have the property disposed of as in case of intestacy, but that it should be appraised and applied to the payment of debts. *TOMPKINS, J., dis.* *Erwin v. Henry*, v. 469.

15. A provision in a will restraining the devisees of a lot from selling, encumbering or pledging it, disables them from making partition of such lot. *Clamorgan v. Lane*, ix. 442.

16. A testator directed certain slaves to be hired out until A. arrived at the age of twenty-one years, and then sold, and the proceeds divided, &c.—*Held*, that the death of A. during his minority did not affect the condition of the sale, which could not be made until the time when he would have been twenty-one years of age had he lived. *Hamilton v. Lewis*, xiii. 184.

17. The testator's understanding of the words used in his will, ascertained from the will itself, must be adopted in construing it, without reference to lexicographers or adjudicated cases. *Dugans v. Livingston*, xv. 230.

18. Though, in construing a will, effect will be given, if possible, to all the words of the testator, yet particular words will be so construed, if they may be, as to effect his general intent. *Peters v. Carr*, xvi. 54.

19. In a will inartificially drawn by the testator himself, because he has

required that certain acts shall be done only with the consent of his executors, it is not necessarily to be inferred that other acts, though as important in their nature, are to be done in the same manner. When no condition is actually annexed to a power, one need not be sought out. *Norcum v. D'Ench*, xvii. 98.

20. In this country, powers of sale conferred upon executors are not construed with the same strictness as in England. Where there is a power of disposal, with a right to enjoy the money arising from its exercise, united in the same person, the power need not be strictly pursued. *Ibid*.

See EVIDENCE, 57, 58.

IV. OMISSION OF A CHILD.

21. B., in and by his last will, declared that one of his children, naming her, should take no part of his estate—*Held*, that he did not die intestate as to this child, under the provisions of § 20 of the act of 1825, relating to wills. (R. S. 1825, 795.) *Block v. Block*, iii. 594.

22. A will not providing for children of the testator, though voidable under the statute, (R. S. 1825, 795, § 20,) by those injured by it, is good as against strangers. *Chouquette v. Barada*, xxiii. 331.

23. A will was in these words: "I, A. B., of, &c., will that my wife C. D. be my sole heir to all my estate remaining on hand after the payment of my just debts," &c.—*Held*, that the children of A. B. were "not named or provided for" in this will within the meaning of the statute, (R. S. 1845, 1080, § 11,) and that consequently he died intestate as to such children. *Bradley v. Bradley*, xxiv. 311.

24. A will, after a devise to the testator's wife of all his property, contained this provision: "In every other respect I leave it entirely to the will and judgment of my said wife Catherine, how and in what manner she thinks proper to dispose of the estate, as well with reference to our child or children as with reference to the said Joseph Frederick Beck." The testator left one child—*Held*, that such child was named in the will within the meaning of the statute. (R. S. 1845, 1080, § 11. *Beck v. Metz*, xxv. 70.

25. A bequest to a son-in-law, though he is not designated as such, is a naming of the daughter within the statute. (R. S. 1845, 1080, § 11.) *Hockensmith v. Slusher*, xxvi. 237.

26. A will by which the testator devises all his property to his wife, "as her own and exclusive property, and to the exclusion of all and every person or persons, be the same relatives or not," does not name nor provide for the children of the testator within the meaning of the statute. (R. S. 1835, 620, § 30.) *Har-gadine v. Pulte*, xxvii. 423.

See DEVISE AND LEGACY, 17; . . . EVIDENCE, 89; . . . JURISDICTION, 19.

V. PROBATE.

27. Where there has been probate of a will, a court of equity should not set it aside upon a suggestion of fraud and imposition in making it. Proceedings to

invalidate such will must be had at law, by petition, as provided in the statute. (1 Ter. L. 789, § 10.) *Lyne v. Marcus*, i. 410. *Trotters v. Winchester*, i. 413. *Swain v. Gilbert*, iii. 347.

28. Where heirs at law are subscribing witnesses to a will, but are not legatees or devisees under it, and, in a proceeding to establish the will they refuse to testify upon the ground that they are parties to the record, other witnesses may be examined to prove the handwriting of the witnesses and of the testator. *Holmes v. Holloman*, xii. 535.

29. Proceedings to invalidate a will, of which proof had been taken in vacation by the Judge of the probate court, are not premature by reason of having been commenced before the court had confirmed, at a term thereof, the proceedings of the judge. *Potter v. Adams*, xxiv. 159.

See JURISDICTION, 7, 18; . . . PRACTICE IN SUPREME COURT, 23.

VI. WILL LOST, DESTROYED OR EMBEZZLED.

30. A will lost or destroyed may be proved, and its contents established, by secondary evidence, such as a copy, the testimony of subscribing witnesses, &c. *Graham v. O'Fallon*, iii. 507.

31. A probate of so much of a will may be granted as can be proved. *Jackson v. Jackson*, iv. 210. *Dickey v. Malechi*, vi. 177.

32. To authorize the County Court, under the statute, (R.S. 1825, 100, § 22,) to issue a citation to witnesses to testify their knowledge relating to the existence, destruction or possession of a will, it is essential that the executor or other person interested should make his affidavit "that he has cause to believe that some person has concealed or embezzled," &c. *Graham v. O'Fallon*, iv. 338.

33. One witness is sufficient to establish the contents of a lost will. *Graham v. O'Fallon*, iv. 601. *Dickey v. Malechi*, vi. 177.

34. It is of no importance whether a will was destroyed before or after the death of the testator, provided it was done without his knowledge or consent. *Dickey v. Malechi*, vi. 177.

VII. CODICIL.

35. An unattested will may be set up and republished by a codicil legally executed, though not actually attached to the will. *Harvy v. Chouteau*, xiv. 587.

VIII. UNDUE INFLUENCE.

36. An inquiry whether undue influence was exerted over the testator should not be confined to the time of the execution of the will, but whether undue influence had been acquired and operated upon the testator in the disposition of his property. *Taylor v. Wilburn*, xx. 306. See EVIDENCE, 87, 88.

See CHANCERY, 89-90; . . . ESTOPPEL, X.

WITNESS.

I. EXAMINATION OF WITNESSES.

- a. FORM OF QUESTIONS.
- b. CROSS-EXAMINATION.
- c. LEADING QUESTIONS.

II. IMPEACHMENT.

III. INTRODUCTION AT THE TRIAL.

IV. SEPARATION DURING TRIAL.

V. LIABILITY.

VI. COMPETENCY.

- a. GENERALLY.
- b. EXPERTS.
- c. PARTIES TO ACTION, AND PRACTICE AS TO THEIR INTRODUCTION
AT THE TRIAL.
- d. PARTIES INTERESTED IN EVENT OF ACTION.
- e. HOW AFFECTED BY INTEREST, OR OTHERWISE.

- aa. Administrator.
- bb. Agent.
- cc. Assignor of Chose in Action.
- dd. Attorney.
- ee. Brother.
- ff. Clerk.
- gg. Co-Obligor.
- hh. Co-Promisor.
- ii. Creditor.
- jj. Debtor.
- kk. Defendant in Execution.
- ll. Distributee.
- mm. Executor.
- nn. Grantor.
- oo. Indorser.
- pp. Inhabitant of Corporate Town.
- qq. Justice of the Peace.
- rr. Legatee.
- ss. Maker.
- tt. Mortgagor.
- uu. Negro.
- vv. Obligor.
- ww. Owner of Boat.
- xx. Partner.
- yy. Principal and Surety.
- zz. Prochain Ami.
- (aa.) Special Cases.
- (bb.) Stockholder.
- (cc.) Trustee.
- (dd.) Widow.
- (ee.) Wife.

I. EXAMINATION OF WITNESSES.

a. FORM OF QUESTIONS.

1. Where a party undertakes to prove by a witness words which were spoken by a deceased surveyor, relative to a boundary in question, the question must be put in such a manner as to draw out from the witness whatever facts the surveyor stated, and not mere general conclusions which might be derived from a combination of law and fact. *Evans v. Greene*, xxi. 170.

b. CROSS-EXAMINATION.

2. If a witness is sworn, and gives evidence, however formal and unimportant, he may be cross-examined in regard to all matters involved in the issue. *Page v. Kankey*, vi. 433. *Brown v. Burrus*, viii. 26.

3. Great latitude is allowable in the cross-examination of witnesses. *Young v. Smith*, xxv. 341.

c. LEADING QUESTIONS.

4. A witness was asked whether or not the defendant, in a conversation with him, admitted that the plaintiff had not received his share of an estate—*Held*, that the question was leading, and ought to have been suppressed. *McLean v. Thorp*, iii. 215.

5. Leading questions may be asked, in the sound discretion of the court, on a direct examination, where a witness is interested to defeat the party calling him, or manifests a disposition to evade questions, or appears reluctant and unwilling to give evidence. *Walsh v. Agnew*, xii. 520.

6. Leading questions may be put to a witness in the discretion of the court. *The State v. Hughes*, xxiv. 147.

See PRACTICE IN SUPREME COURT, 50.

II. IMPEACHMENT.

7. The credit of a witness may be attacked by showing that he swore differently on a former occasion. *Hays v. Waller*, ii. 222.

8. Where a witness swears, on cross-examination, that he does not remember that he made a particular statement on an occasion specified, his credit may be attacked by showing that he did, in fact, make the statement. *Garret v. The State*, vi. 1.

9. But he must first be inquired of whether he has done or said what is proposed to be proved. *Able v. Shields*, vii. 120. *Clementine v. The State*, xiv. 112.

10. The declarations of a witness out of court are not admissible, except by way of impeachment. *Fanny v. The State*, vi. 122.

11. A witness may be discredited on the ground of bad moral character generally, as general bad reputation for chastity. *The State v. Shields*, xiii. 236. *Day v. The State*, xiii. 422.

12. If a witness testifies with wilful falsity to any material fact, the jury may discredit and reject the whole of his testimony. *The State v. Mix*, xv. 153. *Gillett v. Wimer*, xxiii. 77. *The State v. Dwire*, xxv. 553.

13. The questions of the competency and credibility of witnesses are distinct and independent questions, and the fraudulent conduct of a witness, which might affect his credibility, does not destroy his competency. *Rose v. Bates*, xii. 30.

14. A party cannot introduce evidence merely to discredit his own witness; but if, to establish a fact, he introduces a witness, who fails to prove it, he may prove the fact by another, though in so doing he may show the first witness guilty of perjury. *Brown v. Wood*, xix. 475.

15. Evidence of the general character of a witness for truth and veracity, among a majority of his neighbors, is inadmissible. *Emory v. Phillips*, xxii. 499.

III. INTRODUCTION AT THE TRIAL.

16. Where an interested witness testifies by consent, it is error for the court to withdraw the testimony from the consideration of the jury. *Allen v. Brown*, v. 323.

17. Where a witness has been examined in chief, cross-examined, re-examined and finally dismissed, it lies in the sound discretion of the court trying the case, whether he may again be recalled. If the object in recalling a witness is to re-affirm his former statement only, it is unnecessary, and tends to endless repetition. *Atchison v. St. Bt. Dr. Franklin*, xiv. 63.

See PRACTICE, 224.

IV. SEPARATION DURING TRIAL.

18. It is discretionary with the court whether witnesses shall be separated or not during the trial, so as to prevent them from hearing each other's examination. *King v. The State*, i. 717.

19. The witnesses were ordered to leave the court room during the examination of witnesses. A witness returned in violation of the order, and the defendant offered to examine him. The witness stated that he returned because the defendant told him that he did not wish to examine him, and the defendant stated that he did not wish to examine him to any point to which others had testified—*Held*, that the court did not err in refusing to permit him to be examined. *Dyer v. Morris*, iv. 214.

20. A witness, by remaining within hearing while other witnesses are examined, in disobedience of an order of court, cannot deprive the party calling him of the benefit of his testimony, when neither such party nor his attorney were in any manner at fault in the matter. *Keith v. Wilson*, vi. 435.

V. LIABILITY.

21. A witness, duly subpœnaed, his fees having been duly tendered to him, who fails to attend upon the trial to which he is summoned, is liable for the

damages occasioned by his non-attendance, though the suit wherein he was summoned has not been determined. And, in such case, the subpoena, properly authenticated, is evidence, without waiting until the cause is determined for a full transcript of the case. *Connett v. Hamilton*, xvi. 442.

VI. COMPETENCY.

a. GENERALLY.

22. Identity of persons will not be inferred from the mere fact of identity of names, in order to exclude a witness on the ground of interest. *Cozzens v. Gillespie*, iv. 82.

23. All persons who are disinterested are presumed to be competent witnesses until the contrary appears. *Freleigh v. The State*, viii. 606.

24. The word "respectable" in § 31 of the act of February 27th, 1843, (Acts 1842-3, 33,) is equivalent to the phrase "credible, disinterested," in § 17 of the act of March 21, 1835, (R. S. 1835, 487,) and they are synonymous with the word "competent." Therefore, a "respectable" or "credible, disinterested" witness means a "competent" witness. *Ibid.*

25. A witness is not disqualified from testifying on the ground of interest, where his interest in the result, is balanced and equal on both sides. *Bridges v. Bell*, xiii. 69.

26. Under the new code, interest does not render a witness incompetent unless he is a party to the suit, or a person for whose immediate benefit it is prosecuted or defended, or an assignor of a thing in action assigned for the purpose of making him a witness. *Bates v. St. Bt. Madison*, xviii. 99.

b. EXPERTS.

27. A witness will not be permitted to state the symptoms and appearance of cattle that die from want of feed, unless he is an expert in such matters. *Stonam v. Waldo*, xvii. 489.

28. In matters of science and skill, the opinions of experts only can be received in evidence. *Wagner v. Jacoby*, xxvi. 530.

c. PARTIES TO ACTION, AND PRACTICE AS TO THEIR INTRODUCTION AT THE TRIAL.

29. Where the plaintiff proves his demand by the testimony of the defendant, (R. S. 1835, 361, § 16,) the latter is not thereby made a competent witness to prove a set-off against the plaintiff's claim in favor of the defendant. *Musick v. Musick*, vii. 495.

30. Where there is not any or only slight evidence against one of several defendants, the jury may find a separate verdict as to him, and his discharge will render him a competent witness for his co-defendants. *Brown v. Burrus*, viii. 26. *Fitzgerald v. The State*, xiv. 413. *Hood v. Mathis*, xxi. 308. *Brown v. Lewis*, xxv. 335. *Benoist v. Sylvester*, xxvi. 585.

31. Although the practice has been to entertain a motion for a separate ver-

dict on the close of the plaintiff's case, the better rule would seem to be for the court to exercise its discretion, and to delay action till all the evidence is submitted, where there is a probability of additional testimony sufficient to justify a verdict against the party. *Benoist v. Sylvester*, xxvi. 585.

32. It is too late to apply for such separate verdict after the arguments in the case are closed. *Hood v. Mathis*, xxi. 308.

33. A. and B. were sued on a note before a Justice, and judgment obtained against them, from which A. appealed, and, the other defendant not joining in it, a severance was granted. On the trial of the appeal the plaintiff offered B. as a witness—*Held*, that he was interested in the event of the suit, and therefore incompetent. (See R. S. 1835, 361, §§ 16, 17.) *Levy v. Hawley*, viii. 510.

34. But where judgment was rendered against A. and confessed by B., in a Justice's Court, on a bond executed by A. and B., on an appeal to Circuit Court by A., in which B. did not join, B. is a competent witness to prove that A. did not execute the bond. *Coons v. Green*, ix. 197.

35. A party who is liable to be called on as a witness by his adversary in a Justice's Court, is equally liable in the Circuit Court on an appeal. [*Martien v. Barr*, v. 102, commented upon.] *Grigg v. Bodrio*, ix. 222.

36. A party is a competent witness in his own favor, in cases where the defendant has been guilty of some tortious act, or where no other evidence of the facts can be had, as in the case of a bailee who breaks open a box committed to his care and steals the contents; and the rule also extends to inn-keepers whose lodgers are robbed. *Sparr v. Wellman*, xi. 230.

37. In all such cases the tort or robbery must first be proved by evidence *aliunde*, before the plaintiff can, by his own oath, establish the fact of the articles stolen or lost. *Ibid*.

38. And the evidence, to establish the tort or robbery, must be clear, and its weight and sufficiency determined by the court. *Ibid*.

39. A mere formal party, standing indifferent to the real parties in interest, may be examined as a witness. *Block v. Chase*, xv. 344.

40. A defendant who is a mere trustee is a competent witness for the *cestui que trust*. If, however, he were incompetent, the dismissal of the suit as to him, after his testimony had been taken, would not restore his competency. *McLaughlin v. McLaughlin*, xvi. 242.

41. Under the new code, one defendant is not a competent witness for his co-defendant. *Young v. Croughton*, xvii. 367. *Rice v. Morton*, xix. 263. *Rankin v. Harper*, xxiii. 579.

42. The deposition of a master of a steamboat, which had been seized under the statute for the transportation, by the master thereof, of a slave from one place to another in this State, without the consent of the owner, and released upon the giving of a bond by the master with security, under the statute, (R. S. 1845, 182, § 9,) is inadmissible in evidence in favor of the master and his securities. The declarations of the master are admissible in evidence against him. *Withers v. St. Bt. El Paso*, xxiv. 204.

43. To entitle a party to a suit under the statute of 1849, (Acts 1848-9, 99, § 11,) or the statute of 1855, (R. S. 1855, 1577, § 3,) to examine as a witness in

his behalf a party to the suit, the party summoned must be an adverse party, and not merely an opposing party on the record. *Harris v. Harris*, xxv. 567.

See PRACTICE, 113.

d. PARTIES INTERESTED IN EVENT OF ACTION.

44. The interest of a witness in the result of a suit may be released, and the witness thereby rendered competent. *Evans v. Hays*, ii. 97.

45. A person who is named in the writ as a defendant, but who is not served with process, is not a party to the action, and his liability to the plaintiff is not affected by the result of the suit. He is therefore a competent witness for defendant when he is released from liability for contribution. *Steigers v. Gross*, vii. 261.

46. But where the defendant and C. and R. were sued on a note as partners, the defendant alone being served with process, the plaintiff offered C. as a witness to prove the partnership—*Held*, that he was incompetent on the ground of interest in the event of the suit. *Dixon v. Hood*, vii. 414.

47. Where a party has a community of interest in the subject matter of a suit, he is, nevertheless, a competent witness, where the record cannot be used as evidence, either for or against him. *Cason v. White*, viii. 216.

48. A witness who has no legal interest in the event of a suit, is competent, although he may expect to be benefitted by the judgment. *Warne v. Prentiss*, ix. 540.

49. An actual and real party to a suit, whether named in the record as such, or not, cannot be compelled to testify himself. *Benoist v. Darby*, xii. 196.

50. Under the act of 1849, (Acts 1848-9, 99, § 1,) the evidence of a witness contingently liable, is admissible. *St. Bt. Madison v. Wells*, xiv. 360.

51. In an action by A. against B., for money advanced at the instance of C., on a contract made by C. in his own name, on behalf of B., with D., for the purchase of a boat, C. is not a competent witness for A., under the system of practice prior to the new code. *Winston v. Wales*, xvii. 370.

52. A person who is bound to pay one-half the damages and costs in a suit in case of a recovery, is not "a person for whose immediate benefit the action is defended," within the meaning of the statute, (Acts 1848-9, 100, § 2,) and is a competent witness. *Laumier v. Francis*, xxiii. 181.

53. The fact that a person introduced as a witness had before the commencement of the suit, received an order from the plaintiff for the sum sued for, the order not being accepted in discharge of the debt due him from the plaintiff, and that he was authorized to bring suit for the plaintiff, does not disqualify him as a witness in behalf of the plaintiff; the suit is not prosecuted for his immediate benefit. *Sawyer v. Mitchell*, xxvii. 510.

e. HOW AFFECTED BY INTEREST, OR OTHERWISE.

aa. Administrator.

54. An administrator, having no interest in an estate, further than the *per*

centum allowed him by law, is a competent witness to prove a debt or demand, due the intestate. *Graves v. Priest*, i. 214. *Graves v. Black*, i. 221.

bb. *Agent.*

55. An agent is a competent witness to prove contracts made by him on behalf of his principal. *Stothard v. Aull*, vii. 318.

56. A party who executed a note for the defendant, under an assumed agency, is a competent witness for the defendant, to prove that he had no authority. *St. John v. McConnell*, xix. 38.

cc. *Assignor of Chose in Action.*

57. The assignor of a chose in action, is a competent witness on the trial of a suit brought upon the assigned claim. *Porter v. Rea*, vi. 48. (But, by the R. S. 1855, 1577, § 6, not as to facts occurring prior to the assignment.)

58. The assignor of a chose in action, assigned for the purpose of making him a witness, should not be excluded, under the statute, (Acts 1848-9, 99, §§ 1, 2,) where, after such assignment, the assignor is entirely divested of interest in the event of the action. *McKinley v. Williamson*, xxiii. 65. See *Hamilton v. Rice*, 7 Barb., 155. [But see R. S. 1855, 1577, § 6, cl. 2.]

dd. *Attorney.*

59. An attorney who draws up a will, and is present at its execution, sees it in the possession of the testator's family after his death, and reads it, and recollects its principal provisions, is a competent witness to prove these facts, and his evidence is not subject to the objection, that it discloses confidential communications of a client. *Graham v. O'Fallon*, iv. 338.

ee. *Brother.*

60. The brother of the deceased, and a distributee of his estate, is not a competent witness in behalf of the estate. *Foster v. Nowlin*, iv. 18.

ff. *Clerk.*

61. A clerk, who pays out the money of his employer by mistake, is a competent witness for him in an action to recover it back. *Burd v. Ross*, xv. 254.

gg. *Co-obligor.*

62. In an action brought against one of two obligors to a bond, the co-obligor cannot, under the statute, (R. S. 1845, 833, § 26,) be a witness for the defendant. *Callaway County Court v. Craig*, ix. 836.

hh. *Co-promisor.*

63. Where one of two joint promisors is alone sued, and he executes to the other a release of all claim over upon him, the party thus released is a competent witness for his co-promisor. *Long v. Story*, xiii. 4.

ii. *Creditor.*

64. A creditor of a solvent estate is a competent witness in behalf of such estate. *Foster v. Wallace*, ii. 231.

jj. *Debtor.*

65. Where property is conveyed in trust to secure a debt, and is subsequently taken on an execution against the debtor by a third party, and suit is brought by the trustee against such third party, the debtor is interested in the result, and not a competent witness. *Dameron v. Williams*, vii. 138.

66. In an action against an administrator for money alleged to have been received by him from a debtor of his intestate, such debtor is not a competent witness to prove the payment of such debt, without a release. *Horine v. Horine*, xi. 649.

kk. *Defendant in Execution.*

67. Under the practice act of 1849, (Acts 1848-9, 99, §.1,) the defendant in an execution is a competent witness for the plaintiff in the execution, in a controversy between the latter and the parties to a delivery bond, claiming the property levied on. *Page v. Butler*, xv. 73.

ll. *Distributee.*

68. A person interested in an estate as a distributee, is a competent witness to prove facts, which increase the liabilities of the estate. *Richmond v. Cross*, xiii. 75.

69. Under the new code, (Acts 1848-9, 99, §§ 1, 2,) the distributee of a solvent estate is a competent witness for the estate. *Stein v. Weidman*, xx. 17. [OVERRULING, *Penn v. Watson*, xx. 13.]

See SUPRA, 60.

mm. *Executor.*

70. The statute (R. S. 1845, 1084, § 38,) renders the appointment of an executor void, where he is one of two attesting witnesses; consequently, he is a competent witness to prove the will. *Murphy v. Murphy*, xxiv. 526.

nn. *Grantor.*

71. The grantor of a deed which is attacked as fraudulent, may give evidence in support of it. *Baker v. Welch*, iv. 484.

72. A grantor in a deed of trust, under which a party interpleading claims property attached, is not a competent witness for the defendant to show the consideration of the deed. *Keiser v. Moore*, xiv. 28.

oo. *Indorser.*

73. An intermediate indorser of a bill of exchange is a competent witness for plaintiff in an action by the holder against a prior indorser. *Little v. Pratte*, i. 201.

pp. *Inhabitant of Corporate Town.*

74. The inhabitants of a corporate town are competent witnesses for the corporation in a suit brought by the town, and in which the rights of the town are in controversy. *Barada v. Inhabitants of Carondelet*, viii. 644.

qq. *Justice of the Peace.*

75. A Justice before whom a cause was tried, is a competent witness to prove the grounds upon which the cause was determined. *Taylor v. Larkin*, xii. 103.

rr. *Legatee.*

76. A legatee or devisee, who is also heir at law, is a competent witness to prove a fact to establish a will, under which he takes the legacy, when the establishment of the will is against his interest as heir at law. [*Trotters v. Winchester*, i. 413, commented upon and explained.] WASH, J., *dis Dickey v. Malechi*, vi. 177. *Graham v. O'Fallon*, iv. 338. *Same Case*, iv. 601.

ss. *Maker.*

77. The maker of a negotiable note is a competent witness in a suit thereon by the indorsee against the indorser. *Bank of Missouri v. Hull*, vii, 273.

78. But it is otherwise if the note was indorsed for the accommodation of the maker, since, in that case, the maker is liable for costs. *Ibid.*

tt. *Mortgagor.*

79. In a suit by a mortgagee of personal property, against a purchaser of the mortgaged property, under execution against the mortgagor subsequent to the mortgage, the mortgagor is a competent witness for the mortgagee. *King v. Bailey*, viii. 332.

uu. *Negro.*

80. In a suit for freedom by a negro, is is no objection under the statute (R. S. 1835, 624, § 19,) to a negro witness, that the defendant negro vouches a white man for warranty of title. *Meechum v. Judy*, iv. 361.

vv. *Obligor.*

81. It is competent for the Circuit Court to order the cancelment of the original appeal bond, given before a Justice, and the substitution of another, thereby rendering the original obligor a competent witness for the appellant. *Flournoy v. Andrews*, v. 513.

82. And where, in such a case, the testimony is material, and the fresh security offered is sufficient, it is error for the court to refuse the order. *Thomas v. Alton*, v. 534.

83. The security in a bond for the forthcoming of a boat seized under the act concerning boats and vessels, is a competent witness for the boat under the new code. *Bates v. St. Bt. Madison*, xviii. 99.

ww. *Owner of Boat.*

84. Part owners of a steamboat are not partners, but tenants in common, and one may be a witness for the other. *Cinnamond v. Greenlee*, x. 578.

85. A joint owner of a steamboat is a competent witness in an action *ex delicto* against the other joint owners. *Lee v. Murray*, xii. 280.

86. An owner of the boat at the time of a collision, and where suit was commenced and the boat attached, who sold his interest with the understanding that the purchasers should run the risk of the suit then pending, is incompetent to testify. *Patrick v. St. Bt. J. Q. Adams*, xix. 73.

xx. *Partner.*

87. B. and H. were partners under the firm of B. & Co. H. had a business house of his own distinct from that of the firm. Goods were consigned to the firm, but before their receipt, the consignor instructed B. to deliver them to H., to be sold on commission, and B. acted as the agent of the consignor. In an action by the consignor against H. for the proceeds of the sales of the goods, B. is a competent witness for the plaintiff. *JONES, J., dis. Hanly v. Blanton*, i. 49.

88. One partner is a competent witness by whom to prove that a second partner had advanced money for a third as a part of his portion of the capital. *Per McBRIDE, J. Cinnamond v. Greenlee*, x. 578.

89. A party suing may, under the new code, (Acts 1848-9, 99, § 11,) use as a witness the former partner of the defendant, who confesses the action. *Robinson v. McFaul*, xix. 549.

90. A suit was commenced and summons issued against a firm of two persons, but one of whom was found. At the trial, the partner not found was introduced as a witness on behalf of his co-partner—*Held*, that under the new code, (Acts 1848-9, 99, § 1,) he was a competent witness. *Weston v. Hunt*, xix. 505.

yy. *Principal and Surety.*

91. In a suit against sureties on a bond, the principal, although indemnified against costs, is still interested in the event of the cause, under the statute relating to securities, (R. S. 1835, 574, § 4,) and is not a competent witness for the defense. *Shelton v. Ford*, vii. 209. *Garrett v. Ferguson*, ix. 124.

92. In a suit against a defaulting treasurer, his security in a former bond was offered by the plaintiff as a witness. The witness stated, on his *voir dire*, that he had no interest in the event of the suit, but that he believed a recovery against the defendants would prevent a suit against himself—*Held*, that he was a competent witness. *Todd v. Boone County*, viii. 431.

93. A co-security, not a party to the suit, is a competent witness against his co-security. *Craig v. Callaway County Court*, xii. 94.

94. The principal in a promissory note, bearing ten per cent. interest, against whom a judgment by default has been rendered, is a competent witness for his securities, after having been released by them from payment of all costs and interest above the rate of six per cent. upon the amount which should be adjudged against them. *Hogg v. Breckenridge*, xii. 369.

zz. *Prochain Ami.*

95. Where a minor sues by his next friend, the next friend is a competent witness in behalf of such minor plaintiff. *Murphy v. Murphy*, xxiv. 526.

(aa.) *Special Cases.*

96. A person of whom a plaintiff purchased a slave, is a competent witness to prove the loss of a bill of sale for the slave, given by the defendant to witness, notwithstanding the latter may have warranted the title to the plaintiff. *Ellis v. Ellis*, i. 220.

97. Where S. has a claim against M. for a sum of money and C. pays it, S. is an incompetent witness for C. to prove that the money was paid at B.'s request. *Rector v. McNair*, i. 471.

98. A person to whom a horse has been sold, and who has himself assigned his interest, is a competent witness in behalf of his assignee, in a suit against the original vendor, to prove the nature of the sale to himself, if his own sale is without recourse. *Floyde v. Wiley*, i. 643.

99. A. loaned a billiard table to B. The table, after being in B.'s possession for upwards of twelve months, was levied upon and sold as his property—*Held*, in an action of trover brought by A. against the purchaser, that B. was not a competent witness to prove the nature of his possession. *Valois v. Warner*, i. 730.

(bb.) *Stockholder.*

100. In a suit against a corporation, a stockholder therein is a competent witness in its behalf, although, in case of a deficiency of corporate property, he would be liable to double the amount of his stock. *Quære*—Whether he would be so if the corporation should be shown to be insolvent? *Barclay v. Globe Mutual Ins. Co.*, xxvi. 490.

(cc.) *Trustee.*

101. Where one of several trustees is interested to keep the trust as large as possible, he is incompetent to testify in an action against the other trustees. *Hayden v. Cornelius*, xii. 321.

(dd.) *Widow.*

102. Under the new code, (Acts 1848-9, 99, § 1,) a widow is a competent witness for her deceased husband's estate. *Scroggin v. Holland*, xvi. 419. *Sherwood v. Hill*, xxv. 391.

103. The widow of a decedent may be a witness for or against the administrator or executor of the estate of her deceased husband, whether solvent or insolvent, as to all such facts as the policy of the law does not require to be kept sacred and secret, between husband and wife, during the marriage. *Stein v. Weidman*, xx. 17.

104. The widow of a decedent, being at the time of the trial the wife of the administrator, is a competent witness for him, as to facts which came to her knowledge before he was appointed administrator. *Ibid.*

(ee.) *Wife.*

105. Under the new code, (Acts 1848-9, 99. § 1,) a wife is a competent witness in an action for the value of property against the special bailee of the husband, even if her husband is directly interested in the suit. *Funk v. Dillon*, xxi. 294.

See CRIMINAL LAW, XI.

WOODS, MARSHES AND PRAIRIES.

1. The word "farms," as used in the statute to prevent the firing of woods, marshes and prairies, is not confined to inclosures. *Finley v. Langston*, xii. 120.

2. A person who sets fire around his own farm, does so at his peril; and if it occasions damage to another, he is liable under the statute, no matter what may have been his motive. *Ibid.*

3. Upon the trial of a *qui tam* action, founded upon the statute to prevent the firing of woods, marshes and prairies, (R. S. 1845, 1090,) evidence to prove that the land where the fire was set out belonged to the defendant is irrelevant. *Ibid.*

4. A. set fire to the stubble on his own inclosure, and without any negligence or default on his part, and by inevitable accident, the fire spread over the open prairie to the inclosure of B., and burnt his fence.—*Held*, that A. was not liable for the damage. *Miller v. Martin*, xvi. 508.

See ACTION, 8.

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